The Advocate

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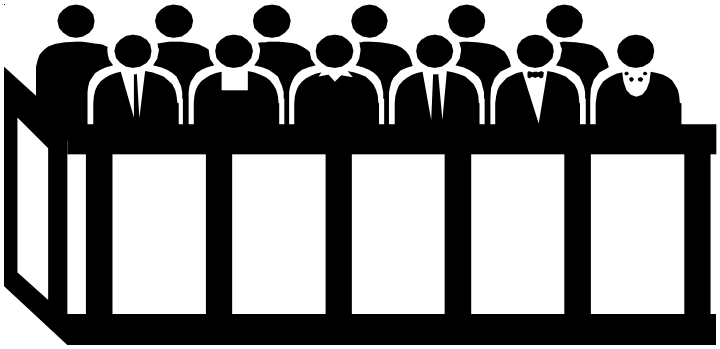

DOES YOUR CLIENT HAVE A FAIR JURY POOL?

THE RESPONSIBILITY OF LEGAL SUPERVISION

KENTUCKY DEFENDER CASELOADS AVERAGE 484 PER ATTORNEY!

THE PUBLIC VALUE OF PUBLIC DEFENDERS

TEN TENETS OF FAIR AND EFFECTIVE PROBLEM SOLVING COURTS

32ND ANNUAL DEFENDER EDUCATION CONFERENCE

MIKE PARKS, PUBLIC ADVOCACY INVESTIGATOR

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The Advocate:
Ky OPA's Journal of Criminal Justice Education and Research

The Advocate provides education and research for persons serving indigent clients in order to improve client representation and insure fair process and reliable results for those whose life or liberty is at risk. It educates criminal justice professionals and the public on defender work, mission and values.

The Advocate is a bi-monthly (January, March, May, July, September, November) publication of the Office of Public Advocacy, an independent agency within the Environmental & Public Protection Cabinet. Opinions expressed in articles are those of the authors and do not necessarily represent the views of OPA. *The Advocate* welcomes correspondence on subjects covered by it. If you have an article our readers will find of interest, type a short outline or general description and send it to the Editor.

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FROM THE EDITOR...

Ed Monahan

No Exceptions. We carry the third installment of our No Exceptions series with a focus on Kentucky defenders excessive caseloads and the consequences it has on citizens accused of a crime and on the criminal justice system.

Criminal Defense Education. For the 32nd year we bring you quality legal education in defending criminal defendants successfully. Come join us in Lexington.

Jury Pools. We assume they are fairly composed…but are they? Check your presumption and check out the legal analysis we offer you in this issue.

Supervision. Kentucky defenders believe that clients are better represented with proactive supervision of their legal representation. It is our ethical duty to supervise. Clients appreciate the agency's working to make sure their representation is provided at a quality level. Kentucky defenders use a case review process to help litigators provide quality defense amidst their enormous caseloads. Read more about what is occurring with legal supervision nationally and in Kentucky in this issue

Value. What is the value of public defenders to the public?

Mike Parks is featured in this issue.

Ed Monahan
Deputy Public Advocate

Policymakers face terrible dilemmas. Information is incomplete. The in-box is huge. Resources are limited. There are only so many hours in the day. The choices are tough. And none is tougher than deciding what is a priority and what is not.

– Lee Hamilton

CLOSE AND MANDATORY SUPERVISION OF ASSOCIATES AND PARTNERS: AN IDEA WHOSE TIME HAS COME!

The perspective gained from years of practicing law, supervising other lawyers, and consulting to the legal profession leads me to make what might be to some a startling observation: *as a general proposition, the legal work of most lawyers goes wholly unsupervised!* This condition holds true for all of us — associates and partners in law firms, lawyers working within corporate law departments, and lawyers toiling for government legal agencies.

The Problem Defined

As I visit law offices of all sizes and types, I find that many have no *formal* system of work supervision where more experienced lawyers team up with less experienced colleagues to review work. Reviews of the substantive work of less experienced lawyers are rarely conducted systematically or consistently.

Instead, the adequacy of a system of legal work supervision often depends upon the ideas, capabilities and requirements of individual lawyers acting in supervisory capacities. In fact, too often, the responsibility is left to the lawyer being supervised to seek out the more senior lawyer for guidance and assistance on client matters. Formal supervision systems with rigorous practice standards are rarely in place and actively functioning.

I do not suggest that all legal work at these firms and corporations necessarily goes unsupervised or under-supervised. Certainly some partners or management lawyers are very careful about the quality of work being performed by lawyers they are supervising. Certainly some have effective systems of supervision and work review. But supervision of the work of less experienced lawyers is too important a task to be left to *individual* design and inclination. Unfortunately, that is the situation in far too many law offices.

In high volume practices, the problem can be even more critical. Take a typical insurance defense operation where efficient and systematic processing of insurance defense cases is conducted in a highly leveraged fashion — *i.e.*, substantial use of inexperienced lawyers and paralegals. It is not unusual to see many of the lawyers in such practices responsible for handling 200 or 250 pending cases each. Many of these lawyers are only perfunctorily supervised, even those only one or two years out of law school.

Moreover, the problem is not confined only to the work of associates. Most law firms have no partner peer review systems, because for years, partners have rejected the idea of other partners having any control over their legal work. These lawyers often feel they will somehow lose important measures of independence if they are required to have their work reviewed by peers. At some firms, this attitude is prevalent even in the ranks of associates.

Is This Really A Problem

So what, you say? Where's the problem, you ask? Lawyers have long prided themselves on being fiercely independent. They say that lack of close supervision of legal work has not usually resulted in trouble. Nonetheless, there are at least three very good reasons why lawyers should pay more attention to the quality of the product put out by their workmates. The reasons are professional, financial and ethical.

The first reason is that as members of a learned profession, we must reasonably do everything we can to ensure that our services are of the highest quality. It simply makes sense. As lawyers, we revere the traditions and integrity of our profession. We often preach to others that all rights carry concomitant responsibilities. If we have the right to be independent — a hallmark of the learned professions — we also have the responsibility to see that all reasonable steps are taken to provide a quality work product. After all, who among us could sensibly assert that supervision of our services is not in the best interests of the profession or the clients we are paid to serve?

The financial reason is obvious: we must protect ourselves. Partners in a law firm are liable for the negligence of their peers and their associates. A professional corporation has to answer for the negligence of its employees, and a corporation or government entity will be called upon to pay for the mistakes of its lawyers as well. In short, if mistakes are made by those under our supervision, either we, our employers, or both will share in the cost of correcting them.

The ethical reason may surprise some. With the promulgation of the Model Rules of Professional Conduct, however, the ABA and all jurisdictions who have adopted the rules have made it explicit that each of us has ethical obligations with regard to the work of subordinate lawyers. Rule 5.1 states:

Rule 5.1 Responsibilities of a Partner or Supervisory Lawyer.

(a) A partner in a law firm shall make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that all lawyers in the firm conform to the Rules of Professional Conduct.

(b) A lawyer having direct supervisory authority over another lawyer shall make reasonable efforts to ensure that the other lawyer conforms to the Rules of Professional Conduct.

(c) A lawyer shall be responsible for another lawyer's violation of the rules of professional conduct if:

(1) the lawyer orders or, with knowledge of the relevant facts and the specific conduct, ratifies the conduct involved, or

(2) the lawyer is a partner in the law firm in which the other lawyer practices or has direct supervisory authority over the other lawyer, and knows of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action.

The Comment to Rule 5.1 states in part:

> Paragraphs (a) and (b) refer to lawyers who have supervisory authority over the professional work of a firm or a legal department of a government agency. This includes members of a partnership and the shareholders in a law firm organized as a professional corporation. This also includes lawyers having supervisory authority in the law department of an enterprise or government agency and lawyers who have intermediate managerial responsibilities in a firm….
>
> Paragraph (c)(1) expresses a general principle concerning responsibility for acts of another. See also Rule 8.4(a).
>
> Paragraph (c)(2) defines the duty of a lawyer having direct supervisory authority over performance of specific legal work by another lawyer…. Partners of a private law firm have at least indirect responsibility for all work being done by the firm, while a partner in charge of a particular matter ordinarily has direct authority over other firm lawyers engaged in the matter….

Avoidance of the Problem

Lawyers are quick to offer many reasons why their offices lack rigorous systems of legal work supervision, but the excuses are often devoid of reason. Listed below are some of the most common excuses I have heard during my law office travels, along with corresponding rebuttals.

"I do not have enough time to get my own work done, much less closely supervise the work of the associates." This is all the more reason why the work of the associate — and the work of the partner speaking these words — needs to be supervised. If a lawyer is extremely busy, the chances are greater that he or she will make a mistake. Busy lawyers need to be more closely supervised than those with less to do. This is true for associates and partners.

"Reviewing the work of the subordinate lawyers is both tedious and time-consuming." Surprising to many lawyers who have not participated in close supervision of other lawyers, legal work reviews, if conducted properly, are enjoyable, professionally stimulating, and take much less time than would appear at first glance.

"The associates (or subordinate lawyers, or partners, etc.) will resist close supervision and morale will suffer." There will be resistance, to be sure, but there is resistance to recording time and sending out bills and no one would argue that these things should not be done solely because they are unpopular. Experience indicates that like the argument about time being wasted, resistance will not be as strong as one might expect.

"It is insulting to a lawyer to have his or her work closely monitored." And it would be insulting to clients if they knew a law firm was not taking all reasonable means to ensure services of the highest caliber.

"Close supervision of lawyers is unnecessary; all lawyers have the utmost concern with quality." This simply is not true, of course. Lawyers are no different than anyone else: most are competent, some are not; most are committed to their clients' causes, some are not; most need no external motivation, some do.

"Close supervision is unprofitable." So is malpractice.

"Close supervision is unethical because the professional code requires that lawyers exercise independent judgment on behalf of clients." This is my personal favorite. First of all, see the discussion above regarding the Rules of Professional Conduct. In addition, supervision of one lawyer by another does not mean that independent judgment is jeopardized. It only means that the lawyer's judgment is likely to be more sound, not less independent.

The Solution to the Problem

Certain characteristics are common to effective systems of legal work supervision in those law firms and departments that have implemented them. In short, these systems work and they do not engender the level of resistance and resentment that so many lawyers seem to fear they will. Properly designed, the systems also do not take inordinate amounts of time. In any event, the time spent is well worth it.

Characteristics common to effective systems of legal work supervision include, at a minimum, the following:

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Face-to-face file reviews

At least quarterly, supervising lawyers should conduct face-to-face file reviews with each subordinate lawyer. All files being worked on by the junior lawyer should be reviewed. The reviews should focus on the quality of the work being performed, timeliness of the performance and control checks, including those relating to diary or tickler systems. The supervisor should write appropriate comments in the files which should be kept in the same location in each folder for quick access. That way, at the next file review, the supervisor can turn first to the comments recorded during the last review to make certain that tasks agreed to were completed, etc. Once a file has been reviewed the first time, subsequent reviews take much less time.

All associates and less experienced partners should be formally assigned to a more-experienced partner for work supervision purposes. The supervising lawyers should get new work assignment lists on at least a monthly basis for each lawyer they supervise. The lists should indicate all matters currently being worked on by the less experienced lawyer, the date on which the matter was assigned to the lawyer, the last date on which the lawyer worked on the file and the activity performed, and the total time recorded to date on the file. These lists should be present at the reviews to stimulate intelligent questions, and as a control to ensure that *all* files are being reviewed.

Critical stage reviews

In addition to quarterly case reviews, less experienced attorneys should be required to discuss each matter (especially litigation cases) with supervisors at all critical stages:

- before filing the complaint or answering one filed by an opponent;
- before filing a motion or answering the motion of an adversary;
- to plan discovery needs and strategy;
- to determine the settlement value of the case;
- to discuss settlement offers;
- to prepare for trial; and
- to decide whether to appeal adverse judgments.

Also, all *non-routine* pleadings should be reviewed by supervisors prior to filing.

Strategy meetings

Depending upon the size of the firm or law department, lawyers should be assigned to groups working on similar types of legal matters or for common clients. On a regular basis (weekly works well), these working groups should conduct meetings of all appropriate lawyers and paralegals to review work being handled, to brainstorm various strategies, to discuss developments in the law or talk about client issues. Frequently, such meetings are also used to deal with docket control matters; *i.e.*, review of the court docket for the next week to make certain that assignments are clear and that lawyers are prepared for the court appearance or deposition, etc. Firms that hold such meetings recommend that they be structured and controlled by:

- Distributing an agenda in advance;
- Having relevant files pulled and reviewed by paralegals or secretaries before the meeting to ensure that time is not wasted at the meeting;
- Devoting part of each meeting to the discussion of issues of both substance and procedure with regard to cases; in addition, cases with common issues and parties should be discussed;
- Devoting part of each meeting for lawyers to share information from continuing legal education courses recently attended; and
- Devoting *special* meetings to formal training for less experienced lawyers.

Finally, file handling meetings work best if they are scheduled on the same day each week, at a time when most lawyers can attend, perhaps lunch time or after 5:00 p.m. The meetings can usually be conducted in one hour.

Co-counseling of litigation cases

Many firms that effectively supervise legal work have instituted systems of co-counseling for all but small and easily resolved litigation matters. Each such case is staffed with one senior and one less senior attorney. The overall number of cases being handled between the two should be identical to the total number the two could handle individually. Depending upon the amount in controversy and the sensitivity of the matter, in some situations the more senior lawyer has first-chair responsibility and the less senior lawyer is the lead attorney in others.

Co-counseling systems produce a number of positive results:

- someone with whom to strategize on litigation matters; and ultimately professional collegiality;
- back-up coverage for court appearances in case of attorney illness or absence;
- initiation of mentoring relationships that often do not otherwise exist; and
- career growth and professional development.

Partners included, too

Law firms and departments should not exclude partners or management lawyers from work supervision systems based on status alone. The relevant criterion should be the amount of the lawyer's experience with respect to the type of matter being handled. The work of less experienced partners should be reviewed by more senior partners.

Very few law firms have systems for partner peer review. Those that do report overwhelmingly positive results from using them. Typically, these systems define the types of matters subject to peer review, how the reviews are to be conducted and the

frequency and level of scrutiny required. If for no other reasons than the increasing proclivity of clients to sue their lawyers and the importance to a law firm of being able to produce work of the highest caliber possible, all firms would be wise to require partner peer review.

Conclusion

Close supervision of legal work should be a top priority for all law firms and law departments. Top partners of law firms and managers of law departments who employ systems of close legal work supervision universally report that the advantages clearly outweigh the disadvantages. My personal experience also bears this out.

To recap, here are some reasons why your firm or department should adopt such systems:

- it is the professional thing to do;
- the lawyers' and organization's exposure to complaints and claims for professional negligence will be reduced;
- you might very well be able to negotiate a more attractive malpractice insurance premium;
- they go a long way to ensuring compliance with the dictates of Rule 5.1 of the Rules of Professional Conduct; and
- you will be able to sleep better at night.

James S. Wilber

***James Wilber is** a principal of legal management consultancy Altman Weil, Inc. resident in the firm's Mid-West office. Mr. Wilber heads Altman Weil's services to corporate and government law departments. He leads consulting projects in strategic planning, practice management, lawyer professional development, organization, performance reviews, compensation, and executive searches. Contact him at 414-427-5400 or jswilber@altmanweil.com.* ■

HELPFUL COACHING BY CASE REVIEW METHOD

We know that proactive coaching is helpful to both the experienced and inexperienced criminal defense litigator. It is just common sense that helpful advice from another perspective will benefit any professional worth their salt.

Kentucky defenders believe in active supervision focused on helpful advice to the litigator, and it is often provided by supervisors by the practical method of case review.

What is case review & its purpose? Case review is a method of looking at, assessing, and analyzing an entire case with outside perspectives. The primary purpose of case review is to assure quality representation to our client *before*, not after, the representation provided. This is achieved by raising awareness, reinforcing an approach, encouraging different options, offering additional perspectives by examining the case comprehensively at a point in time when the staff attorney feels ready for the next significant event in the case, and most importantly supporting the attorney's effective representation.

How is case review conducted? At its best, case review is an ongoing process between the attorney representing the client and the attorney's supervisor or one or more other experienced attorneys. Preferably, the attorney representing the client drives it. The attorney with the case to be reviewed is the person who engages others for the assistance needed. For attorneys who are not operating at a level of awareness to seek the review on their own, supervisors can invite the review process be taken advantage of or it can be a routine office procedure.

The Kentucky Office of Public Advocacy has decided as a matter of policy that a case review will be done on all capital cases. Each attorney without a capital case will have at least one case review done each year. This is reflected in all supervisor and employee performance agreements.

Case review can take different shapes and occur in different ways. The medical model of obtaining data, diagnosing, and providing a treatment plan with periodic check-ups is a standard approach of providing help to someone with a problem. The mental health therapeutic approach is another way to help a person with needs. The patient reports the problem, there is a structured dialogue and then diagnosis and treatment takes place. Often the treatment amounts to arriving at an awareness of the obvious, making a commitment to the known, having an increased ability to employ healthy processes, gaining confidence, or greater perspective. The case review approaches can be highly directive or more supportive, depending on the needs of the attorney. The case reviewer can ask the attorney to articulate needs and then the two can decide which to focus on. The reviewer could systematically go through the components of the trial, appellate, or post-conviction representation questioning and dialoguing as necessary with the attorney. It can happen between a supervisor and a staff attorney or among peers.

Context of case review. Where does case review fit into the work on a case? Competent representation mandates deliberate employment of quality assurance processes. Quality legal pro-

cesses include thinking expansively and creatively at the beginning of the case representation process (brainstorming with others), coaching throughout case representation (case review or peer review), mock practices with feedback; observation in court; random case-file review; evaluation by the customers (clients); and performance evaluations. The larger quality representation coaching process includes the following steps:

1) performance planning: role identification, goal setting, contracting for coaching style;
2) investigation; obtaining relevant case data;
3) organizing case information;
4) brainstorming case solutions and strategies;
5) analyzing;
6) deciding;
7) case review;
8) practicing with feedback;
9) executing in court;
10) observing litigation;
11) co-counseling;
12) case file review;
13) performance surveys;
14) performance evaluations.

Case review is an integral, unifying part of this larger performance process.

The coaching. Through the case review process, the coach has the opportunity to help the attorney not only competently perform in this particular case but also help the attorney learn how to improve overall across all the cases. The coaching includes evaluation of how the process of representing this client in this case is being done with the goal of increasing representation knowledge, skills, attitudes and processes for this and future clients by this attorney and other attorneys in the office. It seeks client-centered quality representation, greater self-awareness, better ways of doing things, fuller perspective. This is done with coaching the development of the following: helping the person reframe problems, helping the person transfer skills from one context to the problem area, helping the person explore strategic alternatives, and helping the person confront negativity within themselves or others they are working with.

Who does case review? Obviously, new or inexperienced attorneys will benefit from case review, as they work to gain awareness, experience, perspective, and knowledge of standard methods of representation. Less obviously, the experienced attorneys will benefit from such review to confront and account for bad habits, being stuck in the routine, skipping parts of the process out of arrogance, lacking efficiency, confronting personal defenses that may be unknown.

Advantages of case review. The analysis of a case with an attorney *before* the attorney performs the particular work in the case has the huge advantage of helping the attorney improve by assisting future practice which gives the attorney more confidence, more control and more effective experiences. This positive experience of help is likely to encourage the employee to seek additional assistance via case review. Case review will take place frequently for new attorneys and when attorneys transition into new levels of practice, like from misdemeanor court to felony court, or from an intermediate court of appeals to the state's highest appellate court, or when handling a type of case that involves specialized skills, like a sexual abuse case. Because of their complexity, the enormity and their protracted nature, case review will occur for all capital cases and probably more than one time. Senior attorneys who fall into ruts benefit from this outside perspective, boost of confidence, and the raising of the bar.

Client's standard is quality. Quality is the only acceptable standard for service to the clients of today. We always want quality service when we are the customer. We really have little tolerance for anything less whether it be service for our car, our airline flight or our body.

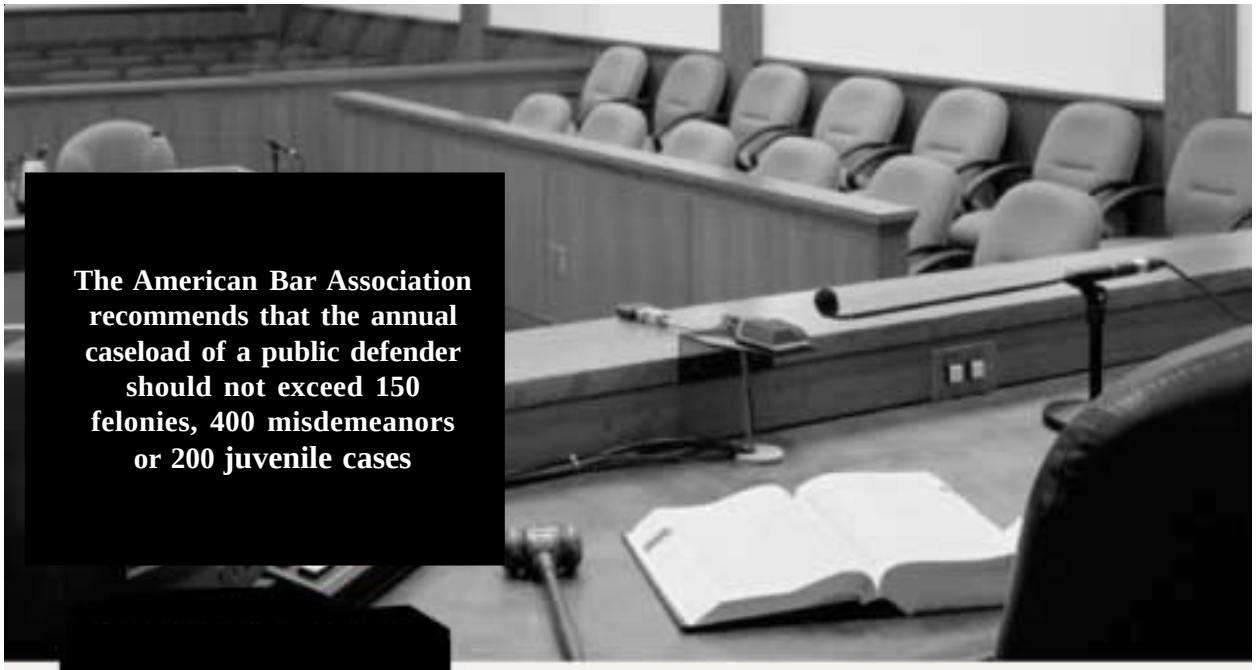
National legal standard is quality. The ABA Standards for Criminal Justice Providing Defense Services (3d ed. 1992) set out *quality* as the standard for all legal representation: "The objective in providing counsel should be to assure that quality legal representation is afforded to all persons eligible for counsel pursuant to this chapter." Standard 5-1.1. Case review provides a way to continuously improve the methods of working to solve problems for clients before the representation is provided.

Conclusion. Proactive coaching which provides disciplined help for defenders is no longer an option for Kentucky defender leaders. ■

Edward C. Monahan
Deputy Public Advocate

Until you value yourself, you won't value your time. Until you value your time, you will not do anything with it.

-- M. Scott Peck



The American Bar Association recommends that the annual caseload of a public defender should not exceed 150 felonies, 400 misdemeanors or 200 juvenile cases

A London public defender handled an average 534 cases in Fiscal Year 2003.

In Fiscal Year 2003, the average caseload of the attorneys in the Morehead Office was 507 cases.

Imagine that you have been arrested and accused of a crime, but you can't afford an attorney….

Thanks to the Supreme Court ruling in *Gideon v. Wainwright*, you are guaranteed access to legal representation and a judge must appoint one for you.

Now imagine that your appointed attorney deals with hundreds of cases a year, including yours….

Public defense attorneys strive to represent their clients in the best manner possible. But too often, attorneys carry such huge caseloads that they barely have time to talk to their clients; much less conduct the kind of factual and legal research necessary to provide meaningful representation.

By burying public defense attorneys under overwhelming caseloads, we are smothering any hope for a fair justice system. The promise of *Gideon* is not being met.

Without the guarantee of qualified counsel who have controlled caseloads and enough time to perform their jobs, we do not have a fair justice system.
No Exceptions.

To learn more about the campaign and the issue, visit www.NoExceptions.org.

NO EXCEPTIONS
It's the American Way

JURY POOL ISSUES

A. Is There a Problem?

Tim Arnold

Scenario #1: The attorneys are ready for a murder trial and appear in circuit court on Monday morning. Defense attorney notices the courtroom seems pretty empty as he watches prospective jurors gather. When the deputy clerk calls the roll, he learns that only 40 of 60 jurors who were expected are present. No one seems to know why, but the court does not regard the matter as a problem, and the client is forced to select a jury from an extremely limited pool of jurors.

Gail Robinson

Scenario #2: It's Friday afternoon, and the attorneys at the local OPA office are sitting around discussing the numerous trials they've had over the last year. Their county has a substantial African American population, over a third. But for some trials there have been no black jurors in the pool, and for most trials there have been only a few. The lawyers can't figure out what the problem is or what to do to solve it.

These scenarios are typical of the types of problems that can come up in the jury selection process. The purpose of this article is to set forth the law on selecting jurors and suggest issues that may need to be pursued.

B. Kentucky Law

Any experienced defense attorney knows that a fair trial is an impossibility without a fair jury panel. For many years jurors in Kentucky were selected solely from voter registration lists by jury commissioners chosen by the circuit judge. KRS 29A.030 (now repealed). Particularly in capital cases, defense counsel routinely investigated the composition of jury panels and often found that women, blacks and young adults (ages 18-29) were substantially underrepresented on those panels. Many motions were filed across the Commonwealth. Eventually the Kentucky Supreme Court abolished the jury commissioner system and in 1991 implemented a new automated random selection system with broader source lists including both the voters list and the drivers license

list. Those of us who had been litigating jury issues were pleased with the change and we did begin to see jury panels more representative of their communities. We may even have become a bit complacent.

A few years ago we represented a client facing capital murder charges in a rural county. We kept hearing from various folks involved with the court system that there was a problem getting enough jurors for the selection process in capital and other serious cases. Then the judge entered an order "carrying over" jurors from one term to the next to ensure sufficient jurors would be available for our clients trial. We decided we had a duty to investigate and when we did we found significant problems.

1. How to investigate

KRS 29A.110 provides that records and papers used by AOC and the clerk in connection with the jury selection process and not required to be disclosed shall not be disclosed "except in connection with the preparation or presentation of a motion under the Rules of Civil Procedure or the Rules of Criminal Procedure or upon order of the Chief Justice." § 13 of the Administrative Procedures of the Court of Justice, Part II. Jury Selection and Management (hereinafter APCJ, Part II) contains the same provision. Defense counsel may want to send a letter to the clerk and chief circuit judge citing this authority and requesting relevant records.

2. Source lists and random selection process

The first critical step is to read carefully KRS Chapter 29A and Part II, Jury Selection and Management of the APCJ as well as RCr 9.30 - 9.40. KRS 29A.040, which was revised in 2002 to add those filing tax returns describes the master list of prospective jurors which includes voters, licensed drivers and those who have filed Kentucky income tax returns. AOC is to obtain the relevant lists from state agencies and then merge them. *See* also § 2 of the APCJ, Part II. § 3 of the APCJ, Part II provides that AOC will select jurors from the master list by computer at random. The chief circuit judge or his designee advises AOC at least once a year of the number of jurors that will be needed. *Id*. Moreover, each district and circuit judge must notify the chief circuit judge of his need for jurors during the next jury term and shall advise if a larger panel than usual is needed because of a case with particular notoriety. *Id*. at § 4; KRS 29A.060(1).

Once AOC provides a randomized list of jurors the chief circuit judge is responsible for deciding how many jurors should be chosen from the list in sequential order for a particular term of court and for causing those jurors to be summonsed for service at least 30 days before they are required to attend. KRS 29.060(3); APCJ, Part II, § § 5 and 6. Those names are to be made available to the public. APCJ, Part II, § 5. Service of the summons is to be made by first class mail or, if that method fails, personally by the sheriff. KRS 29A.060; APCJ, Part II, § 6. The juror qualification form shall be enclosed with the summons, and jurors shall be advised to complete it and return it within 10 days. KRS 29A.060(4); KRS 29A.070; APCJ, Part II, § 7.

3. Disqualification of jurors

KRS 29A.080(2) and APCJ, Part II, § 8 address "disqualification's" for jury service. This is to be distinguished from "excuses." Disqualifications are limited to the following:

A prospective juror is disqualified to serve on a jury if the juror:

(a) Is under eighteen (18) years of age;
(b) Is not a citizen of the United States;
(c) Is not a resident of the county;
(d) Has insufficient knowledge of the English language;
(e) Has been previously convicted of a felony and has not been pardoned or received a restoration of civil rights by the Governor or other authorized person of the jurisdiction in which the person was convicted;
(f) Is presently under indictment; or
(g) Has served on a jury within the time limitations set out under KRS 29A.130.

The juror qualification form includes questions about each of those grounds. Until July 15, 2002 only the chief circuit judge or another Judge he designated could decide if a juror was disqualified from service. Now the chief circuit judge or other named individuals he may designate, including a court administrator or deputy clerk, can decide based on review of the qualification form whether a juror is disqualified. KRS 29A.080(1). If the juror is determined to be disqualified, that shall be entered on the form and the juror shall be notified. *Id*. Moreover, the chief circuit judge may grant a permanent exemption if an individual requests and he finds "a permanent medical condition rendering the individual incapable of serving." KRS 29A.080(3). That judge is to notify the person exempted and AOC. Note that § 8 of APCJ, Part II has not been revised to include these revisions to KRS 29A.080(1) and (3).

4. Excusing jurors from service

If a juror is not statutorily disqualified or permanently exempted from jury service he or she can still ask to be excused "upon a showing of undue hardship, extreme inconvenience, or public necessity." KRS 29A.100(1). If a juror wishes to be "excused" he must ask to be heard on the day jurors are summonsed to appear if he has not done so previously. KRS 29A.100(1); APCJ, Part II, § 9. KRS 29A.090 prohibits automatic exemptions (excuses) from jury service. Postponing or reducing a juror's service rather than excusing him altogether is favored. KRS 29A.100(2) allows the chief judge to designate another judge, court administrator or clerk **to excuse jurors from service for not more than 10 days or post-**

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pone service for no more than twelve months. KRS 29A.100(2). The reason(s) must be entered on the qualification form. **Only the judge may excuse a juror from service altogether, reduce the number of days of service or postpone service up to 24 months.** KRS 29A.100(3). He must record the reason for granting any excuse on the qualification form. Like KRS 29A.080, KRS 29A.100 was revised effective July 15, 2002 to permit the chief judge to delegate some duties in this area to others. § 9 of the APCJ, Part II has not been revised to include the changes to KRS 29A.100.

5. Juror "orientation"

When jurors are summonsed for jury service they are directed to appear before the chief circuit judge at a particular time and place. KRS 29A.060(3). At that time any prospective juror may be questioned by the judge or his designee "but only with regard to his responses to questions contained on the form and grounds for his excuse or disqualification," and the information must be noted on the qualification form. KRS 29A.070(4); §§ 8 (5) and 9, APCJ, Part II. At the time of this appearance the judge "orients" jurors concerning jury service. The judge's bench book outlines the procedures to be followed at the time of that appearance, including general statements that may be made to jurors about the grand and petit jury process. Someone from the local defender office should attend the jury orientation session to learn how the judge implements disqualifications and excuses and listen to the judge's remarks to the jurors. The judge may not follow the bench book "script." If counsel hears or learns about remarks that could prejudice jurors against defendants in criminal cases, as we did in our capital case, further investigation and perhaps litigation may be appropriate.

6. Insufficient jurors for trial

KRS 29A.060 provides that, if there is an "unanticipated shortage of available jurors" from the randomized list, the chief circuit judge "may cause to summonsed a sufficient number of jurors selected sequentially from the randomized jury list beginning with the first name following the last name previously selected." KRS 29A.060(5). *See* APCJ, Part II, § 10(7). Jurors so summonsed need not be given the 30-day notice usually required. KRS 29A.060(7) describes how a judge can obtain jurors from an adjoining county if he is satisfied "after making a fair effort in good faith" that finding a jury in the county free of bias will be "impracticable."

7. Grand jurors

Grand jurors are summonsed in the same manner as all other jurors. KRS 29A.060(3). The chief circuit judge decides when a grand jury shall convene, and that shall occur at least once every 4 months. KRS 29A.210; APCJ, Part II, § 21. That judge may also convene special grand juries. KRS 29A.220; APCJ, Part II, § 22. And a juror deemed incapable of serving as a grand juror but capable of serving as a petit juror may be released from the grand jury and retained for the petit jury. KRS 29A.230; APCJ, Part II § 23.

C. What are the Trouble Spots?

In the capital case we mentioned earlier in this article, our first step in investigating the jury selection process was to request access to the lists provided to the clerk by AOC, the lists of jurors who were summonsed and all juror qualification forms for jurors who had been disqualified or excused. Our client was scheduled for trial in July 2002, and we requested all information for jurors selected to serve for the calendar year 2002. When we reviewed the computer lists provided by AOC we saw that the one for the July-September 2002 term was labeled "Panel No. 1 of 4." Those for the previous two 3 month long terms that year were labeled "Panel No. 3 of 4" and "Panel No. 4 of 4." Further inquiry revealed that the chief judge asked AOC once per year to draw four panels of 500 names. The most recent request was made in August 2001. However, the practice was to "use up" jurors from previous requests to AOC before beginning with the new names provided by AOC. Thus, jurors being used for the first two terms of 2002 were drawn in the Fall of 2000, while "Panel #1 of 4" being used for the July - September term was the first of four 500 name lists drawn in the Fall of 2001. Since the Judge had ordered the previous panel "held over," we were obviously interested in that panel, too.

One might wonder if it would matter that the local authorities were using lists provided by AOC that were not "fresh." It did. Many summons did not reach jurors and were returned. Other prospective jurors were disqualified because they were not county residents. Some were deceased. Even if one reviewed just the July 2002 panel drawn by AOC in August 2001 one learned that only 70% of the qualification forms were even returned, a very poor "yield."

A chief circuit judge has the power to have jurors who cannot be summonsed by first class mail to be served personally by the sheriff. KRS 29A.060(3). Moreover, if a juror who is summonsed by mail does not return the qualification form within ten (10) days, that judge may have him personally served by the sheriff. KRS 29A.060(4). Additionally, the judge may order any juror who fails to return the qualification form "to appear forthwith" to fill it out. KRS 29A.070(4). A juror who fails to appear or to show good cause for that failure may be punished for contempt. KRS 29A.070(5). If judges want jurors to take seriously the requirements of jury service they will have to enforce the requirements of the law by having the sheriff serve personally jurors who aren't reached by mail and requiring jurors who fail to return qualification forms to appear and explain themselves. If judges do not do this, the community may well get the message that a juror summons can be ignored with impunity.

D. Disqualification vs. Excuse

A review of the juror qualification forms revealed that 231 of the 500 jurors were either disqualified or excused. The judge had granted excuses, not just statutory disqualifications, liberally before jurors ever appeared in court. The breakdown for the July-September 2002 panel for our trial clients was as follows:

500 summonsed
178 not returned
48 disqualified (under 18, don't speak English, etc.)
183 excused (undue hardship, etc.)
91 left to serve on circuit, district and grand juries

Less than 20 percent of the 500 jurors to whom summons were sent actually returned forms, were not disqualified or excused and were available to serve on juries.

E. Legal Challenges

We certainly had solved the mystery of why so few jurors were available for trials. Since it was obvious that practically any juror who did not want to serve could avoid service we filed a motion to dismiss the jury panel, asserting that the chief circuit judge had violated KRS Chapter 29A, ACPJ, Part II, the requirements of a fair and impartial jury contained in the 6th and 14th Amendments, United States Constitution, acted arbitrarily contrary to Section 2 of the Kentucky Constitution and violated Section 11 of the Kentucky Constitution. We also objected to the court's order "carrying over" jurors from the previous term as unauthorized by Kentucky law. In support of our motion we filed a lengthy appendix with supporting documentation, and we requested an evidentiary hearing where the chief circuit judge would testify about the disqualification/excuse process. We were denied a hearing, denied the testimony of the judge and went to trial. Since our client was acquitted the issue was never appealed, but we believe it had substantial merit.

The Kentucky Supreme Court has held that preserved error regarding substantial deviation from the statutes regarding selection of jurors will result in reversal of a conviction. In *Commonwealth v. Nelson*, Ky., 841 S.W.2d 628 (1992) the defendant objected to his indictment, urging that the grand jurors had been selected contrary to KRS Chapter 29A.080, 29A.100 and II APCJ Secs. 8 and 12 because the chief circuit judge delegated to court administrators the power to decide whether jurors should be disqualified, excused or postponed from service. *Id*. at 629-630. The Supreme Court observed that such delegation was not permitted by law. *Id*. It then cited *Colvin v. Commonwealth*, Ky., 570 S.W.2d 281 (1978) which held that a defendant has a right to grand and petit juries selected at random from a fair cross section of the community and observed that the court personnel excused, disqualified or postponed service of 73.5% of the prospective grand jurors. *Id*. at 631. "This discretionary reduction in the pool of prospective jurors affects the accused's right to a random selection from a fair cross section of the community." *Id*. The court found the delegation of authority to be substantial deviation from the statute and affirmed the decision of the circuit court dismissing the indictment.

KRS 29A.080(1) and 29A.100(2), as amended in 2002, permit the chief judge to delegate decisions concerning disqualification, excuse from service for 10 days or less and postponement of service for less than a year to another judge, court administrator or clerk. However, decisions regarding excuses for "undue hardship, extreme inconvenience or public necessity" for more than 10 days must still be made by the judge. KRS 29A.100(3). If the local authorities are not following the law concerning jury selection a motion to quash the indictment and/or a motion to dismiss the petit jury panel should be made. Such a motion must be made prior to examination of the jurors. *See* RCr 9.34.

It is important to realize that merely making an oral objection prior to voir dire is not sufficient to preserve the error. In *Grundy v. Commonwealth*, Ky., 25 S.W.3d 76 (2000), the court considered a situation very similar to Scenario #1, where a surprisingly low number of jurors appeared for trial. Trial counsel asked to postpone the proceedings until the no-show jurors appeared, and the court denied the motion. On appeal, Grundy alleged that the court violated *Nelson* by improperly excusing an excessive number of jurors. The Supreme Court held that the claim was unpreserved, because trial counsel had not made a sufficient record to permit the appellate court to rule on whether the excuses were or were not proper.

The accused has a right to a right to make a record sufficient to permit appellate review of alleged errors. *See Powell v. Commonwealth*, Ky., 554 S.W.2d 386, 390 (1977). Consequently, in a situation like Scenario #1, counsel should object to any juror being absent who was not excused pursuant to the procedures set forth in KRS Chapter 29A and APCJ, Part II. Counsel should then ask the court to allow him or her to review the excuses for any "no show" jurors. If the court permits that, counsel should put those excuses in the record for appellate review. If, on the other hand, the judge wishes to proceed to trial without allowing counsel to review the excuses, counsel should make an oral motion on the record asking the court to put the excuses in the record as an avowal.

F. Constitutional Challenges

A challenge to the composition of the petit jury pool is based on the Sixth Amendment right to an impartial jury drawn from a fair cross-section of the community made applicable to the states through the Due Process Clause of the Fourteenth Amendment to the United States Constitution.

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Duncan v. Louisiana, 391 U.S. 145 (1968). If a state chooses to proceed through indictments, as Kentucky does, the indicting process must comply with the requirements of the United States Constitution. A challenge to the pool from which grand jurors are selected is based on Fourteenth Amendment due process and equal protection guarantees. *Peters v. Kiff*, 407 U.S. 493 (1972). Even if a person does not belong to a cognizable group underrepresented in the grand or petit jury pools, he has standing to raise a claim about that group's exclusion. *Peters v. Kiff*, 407 U.S. at 496; *Hobby v. Unites States*, 468 U.S. 339(1984); *Campbell v. Louisiana*, 523 U.S. 392 (1998). The Kentucky Supreme Court held to the contrary in *Ford v. Commonwealth*, Ky., 665 S.W.2d 304(1983), *cert. denied*, 105 S.Ct 392 (Marshall, J., dissenting)[black male in his 50s did not have standing to challenge underrepresentation of women and young adults in grand jury pools], but that case is no longer good law.

These are three elements of proof that a particular group has been excluded or substantially underrepresented in the jury pool.

1. Establish the group's cognizability which is a question of fact. *Hernandez v. Texas*, 347 U.S. 475, 478-9 (1954).

2. Compare the proportion of the group in the jury pool with the proportion in the community of those eligible for jury service. *Id*., 347 U.S. at 480.

3. Demonstrate that the opportunity to discriminate exists. *Alexander v. Louisiana*, 405 U.S. 625, 630 (1972).

See Casteneda v. Partida, 430 U.S. 482, 494-6 (1976); *Duren v. Missouri*, 439 U.S. 357 (1978). Once substantial underrepresentation has been proved, a *prima facie* case is made out, and the burden of rebutting the defendant's case shifts to the state. *Casteneda*, 430 U.S. at 496.

The courts have held many different groups "cognizable." Blacks, *Whitus v. Georgia*, 385 U.S. 545 (1967), and women, *Taylor v. Louisiana*, 419 U.S. 522 (1975), are clearly established cognizable groups. Whether a cognizable group exists is a question of fact. *Hernandez v. Texas*, 347 U.S. 475, 478 (1954). The essence of the cognizability requirement is that the group is in some way distinct from the rest of society and that its interests are unlikely to be adequately represented by other members of the jury pool. *Unites States v. Potter*, 552 F.2d 901 (9th Cir. 1977).

A defendant must prove that a cognizable group has been underrepresented in the jury pool over a "significant period of time." *Castenada v. Partida*, 430 U.S. at 494. Counsel should attempt to compare the percentage of groups in the jury pools with those in the over 18 census population for as long a period as possible. However, even data for less than a year may be adequate. *See Duren v. Missouri*, *supra* (petit jury challenge; 8 months); *Taylor v. Louisiana*, 419 U.S. 522 (1975) (petit jury challenge; one year). While the Kentucky Supreme Court stated in *Ford*, *supra*, 665 S.W.2d at 307-8, that two years did not qualify as a significant period of time, we submit that holding was erroneous.

There is no hard and fast test for "substantial underrepresentation." If the percentage of blacks or women or another cognizable/group in the jury pool compared to their percentage in the adult census population is significantly less, raise the claim.

In *Castaneda*, the Unites States Supreme Court held that, once a defendant demonstrates substantial underrepresentation of a cognizable group, "he has made out a prima facie case of discriminatory purpose, and the burden then shifts to the state to rebut the case." 430 U.S. 482 at 496. However, the Court did note that the fact that the Texas system of selecting grand jurors is "highly subjective" supported its conclusion. 430 U.S. at 497. When the jury commissioner system was still in existence, proving an opportunity to discriminate was relatively easy. With the current system where AOC picks jurors at random by computer, the focus will have to be on the process by which jurors are summonsed and then excused.

G. A Checklist for Thoroughly Investigating Your Jury Panel

Unfortunately, public defenders generally do not have the time or resources to regularly do a thorough investigation of every jury panel in their county. However, even one thorough investigation will provide a lot of insight into the jury selection process which can be used over and over again. All attorneys should try to be able to answer the following questions about the jury selection process in their county:

- When did chief circuit judge ask AOC to select jurors for current term?
- Did he ask for a sufficient number of names from AOC?
- Is the list being used to summons jurors for this term fresh or stale?
- Is the chief judge asking the clerk to summons a sufficient number of jurors?
- If the letters including jury summons and qualification forms don't reach the jurors, is the chief circuit judge having the sheriff attempt personal service?
- Is chief judge or someone he's properly designated reviewing forms and deciding if jurors are disqualified?
- Is the reason for disqualification being entered on the form?
- Is the judge following the strict standard on permanent medical exemptions?
- As far as excuses, is the chief circuit judge acting or designating someone listed in the statute to act only as

permitted (excused up to 10 days, postponement up to 12 months)?
- Is the judge following the strict standard for excuses (undue hardship, extreme inconvenience, public necessity)?
- When does judge grant excuses and does counsel have any input?
- If jurors have appeared for orientation but don't appear for trial, does judge require them to explain themselves?
- Have you attended the orientation and listened to what the judge tell the jurors?

Where it appears that the court is not following the proper procedures, counsel should be sure to get all appropriate documentation, and should be prepared to put that documentation in the record.

For example, an attorney dealing with scenario #2 would want to make the same examination of the process and look carefully at the race of jurors who are dropping out along the way. Counsel would want to look for procedures which tend to exclude jurors of a particular race disproportionately. For instance, a judge who regularly grants permanent excuses to anybody who claims not to be able to afford to miss work for jury service is likely to exclude a much higher percentage of blacks than whites, simply for reasons of economics. Counsel may also want to consider the source lists and whether any of them are unrepresentative of the over 18 population of the county as far as race. Once counsel has verified that there is a problem, and identified a possible source, counsel will want to make a motion and seek a hearing where evidence supporting his claim can be placed in the record.

E. Conclusion

There are many good reasons to insist on a jury selection process which produces jury pools which are sufficiently large to permit meaningful voir dire, and which are representative of a fair cross section of the community. Our clients deserve and are legally entitled to such a process. The citizens of the community deserve to participate in the jury system, and they will have more confidence in that system in juries fairly reflect the composition of the community. ■

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BEATY V. COMMONWEALTH AND THE RIGHT TO PRESENT A DEFENSE IN KENTUCKY

There are few rights guaranteed a criminal defendant as important, or as maligned by the misinformed, as the right to present a defense. As we will see, the ability to present a defense is a constitutionally guaranteed due process right recognized by the Kentucky Supreme Court. As criminal defense practitioners, one of the questions we most want to answer for the jury, when representing a client who asserts the defense of factual innocence, is that of who actually committed the crime. An extreme and thankfully rare example of this is the client who claims he has been "framed." A more common example is the person who, because of police inaction or myopic investigation, has been charged with a crime actually committed by someone else.

Sometimes, the defendant in this situation has no evidence linking anyone else with the crime, and must proceed on that basis; a frustrating situation for client, counsel, and jury alike. How much more frustrating it is, however, to have evidence tending to show the actual culprit, and to be denied the opportunity to present that evidence to the fact finder.

As we shall see, there is legally no reason for the court to deny the defendant the right to present this "aaltperp," or alleged alternative perpetrator, evidence. Indeed, the court is required by law to permit the defendant to present this evidence if he or she elects to do so.


Robert Stephens

In October 2003, the Kentucky Supreme Court rendered an opinion in *Beaty v. Commonwealth*, 2003 WL 22415370, Ky. Section 5 of that opinion is a learned and logical presentation of the right to present a defense in Kentucky.

This right, the Court asserts, is nearly absolute if the tendered evidence is a fundamental part of the defense's strategy. *Id.*, 10. The defense must have, of course, attempted to present the "aaltperp" evidence. *Id.*, 12. To present "aaltperp" evidence according to *Beaty*, the defense must be able to show some evidence of motive and opportunity for another to have committed the crime. *Id.*, 11. Opportunity alone will not usually suffice. *Id.*

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In *Beaty*, the defendant had attempted to present evidence that another (the owner of the vehicle in which methamphetamine was found) had motive to plant the evidence in the vehicle to "frame" the defendant. Denied the opportunity to present this evidence to the jury, however, the "Appellant's defense was left in shambles." *Id.*, 12.

If the defendant has evidence tending to show motive and opportunity for another to have committed the crime, the only real restriction on the right to present it is if "the defense theory is 'unsupported,' 'speculat[ive],' and 'farfetched' and could thereby confuse or mislead the jury." *Id.*, 11, brackets in *Beaty*, quoting *Commonwealth v. Maddox*, Ky., 955 S.W. 2d 718, 721 (1997). This is, however, merely the eternal evidence law balancing question of whether otherwise relevant testimony (evidence which tends to make a question of fact more or less likely to be true) should be excluded because it might nonetheless be more prejudicial than probative. See KRE 401 and 403.

The *Beaty* court stated the "aaltperp" evidence should have been admitted, because it was not cumulative, did not waste the court's time, and had small chance of confusing or misleading the jury. *Id.*, 12. The court actually notes the 403 question should be answered in favor of the defendant, *despite potential confusion*, where the testimony is vitally important to the defense. *Id.*, 12. The Court quotes Wigmore as follows:

> [I]f the evidence [that the crime was committed by someone else] is in truth calculated to cause the jury to doubt, the court should not attempt to decide for the jury that this doubt is purely speculative and fantastic but should afford the accused every opportunity to create that doubt.

Id., brackets in *Beaty*, quoting John Henry Wigmore, *Evidence in Trials at Common Law* Section 139 (Tiller's rev. 1983).

The prosecutor, of course, on closing may argue that the "aaltperp" evidence is weak or incredible, once it has been tendered, but neither the government nor the judge may intrude on the right of the defendant to forward this evidence and to allow the jury to determine its credibility. *Id.*, 13.

This really lies at the heart of how vital a right it is for a defendant to be permitted to present "aaltperp" evidence. It is quintessentially simple for a prosecutor to claim a defendant is seeking to lead the jury down "rabbit trails," or trying to throw out alternate possibilities to "cloud the issue" and create reasonable doubt by confusion. To deny the defendant the right to present evidence tending to support that doubt is completely at odds with due process. Denying the right to present a defense is, essentially, a denial of the right to be found guilty only if proven so beyond a reasonable doubt. It is for this reason, though the *Beaty* court does not directly make the connection, that the right to present a defense is distinguished from the ability to impeach the credibility of the government's witnesses. The ability of defense counsel to poke holes in the government's case by impeaching the credibility of the latter's witnesses is of an altogether different nature (and fundamentally weaker in the eyes of a jury) than the ability to show evidence of who the defense believes actually committed the crime.

This is readily seen in cases where the defendant has been charged with some kind of sex abuse. It is one thing to be able to show the victim, often a child, is capable of lying, but it is much more powerful to be able to show why the child would lie (motive), and how the child would know about the sexual activity in the first place (opportunity by an "aaltperp" to have committed the crime in the past, established by "reverse 404 (b)" evidence of prior sexual abuse on the victim by a third party). See the court's discussion of "reverse 404 (b)" evidence, *Id.*, 11.

Denying the defendant the right to present such evidence if he or she has it is to deny him the right to defend his or her case in a credible manner. Many good defense lawyers believe the jury expects to hear such evidence. How many people would read a mystery novel, for example, where all the author does is throw out doubt about whether the initial suspect committed the crime, without simultaneously showing the real perpetrator? We suspend belief if we think jurors do not expect "aaltperp" evidence when the defendant claims actual innocence. Sometimes we simply do not have the option of presenting "aaltperp" evidence, for we cannot change the facts presented in the case and unearthed by thorough investigation, but to deny our clients the right to present it when available is a gross miscarriage of justice.■

Robert E. Stephens, Jr.
Assistant Public Advocate

If you think you are too small to be effective, you have never been in bed with a mosquito.

-- Bette Reeves

OFFICE OF PUBLIC ADVOCACY'S KENTUCKY INNOCENCE PROJECT

Selection Process for 2004 – 2005 Academic Year Starting

The Post-Conviction Branch, under the direction of the Post Trial Division of the Office for Public Advocacy, established the *Kentucky Innocence Project* [KIP] in the year 2000. KIP was created to provide a resource to the Commonwealth's inmate populations who have meritorious claims of actual innocence. KIP is modeled after successful programs such as the Innocence Project at Cardoza Law School, the Innocence Project Northwest at the University of Washington School of Law and the Center of Wrongful Convictions at Northwestern University. KIP Grant sponsors are: the Kentucky Bar Foundation, IOLTA, the Kentucky Criminal Justice Counsel, and the Byrne Grant.

In order to investigate the cases, KIP has established a relationship with local universities within the Commonwealth: The University of Kentucky College of Law, Chase College of Law at Northern Kentucky University, Eastern Kentucky University and Murray State University. Students are taught investigation skills by the KIP staff and work under the guidance of the KIP staff. The students investigate the cases involving mistaken eyewitness identification, improper forensic inclusion, police & prosecutorial misconduct, defective & fraudulent science, unreliable hair comparisons, bad defense lawyering, false witness testimony, untruthful informants, and/or false confessions.

KIP assigned its first cases to seven law students from the University of Kentucky in January 2001. Within 18-months, KIP had its first success. Herman May was released by immediate court order from the Kentucky State Penitentiary based on DNA tests requested by KIP. Since then, more than 40 cases have been assigned to students for review. One other case is pending in court and several others will soon be requesting the release of evidence for DNA testing

The *Kentucky Innocence Project* has started the selection process for cases involving actual innocence to be assigned in the 2004 – 2005 academic school year. To be eligible for consideration, cases must meet the following criteria:

- Kentucky conviction & incarceration;
- Minimum 10-year sentence;
- Minimum of 3 years to parole eligibility OR if parole has been deferred, a minimum of 3 years to the next appearance before the Kentucky Parole Board; and
- New evidence discovered since conviction or evidence that can be developed through investigation.

If you have had a case that satisfies all of the four criteria that you feel would be a good candidate for the selection process, please contact us at the address or phone number listed below. A *Kentucky Innocence Project* Information Packet will be sent to you requesting specific information about the case. ■

Kentucky Innocence Project
Office of Public Advocacy
Post Conviction Branch
P. O. Box 555
Eddyville, Kentucky 42038
(270) 753-1186

Education is a companion which no misfortune can depress, no crime can destroy, no enemy can alienate, no despotism can enslave. At home, a friend, abroad, an introduction, in solitude a solace and in society an ornament. It chastens vice, it guides virtue, it gives at once grace and government to genius. Without it, what is man? A splendid slave, a reasoning savage.

— Joseph Addison

THE PSYCHOLOGY OF LITIGATION

This is the second in a series by Diana McCoy, Ph.D., clinical and forensic psychologist, summarizing current research in forensic psychology that applies to criminal law.

Competency Restoration

"When the defendant was re-examined on missed items of the Competency to Stand Trial test 90 minutes later, he demonstrated good retention of missed items, which suggests that he had greatly benefited from the educational aspects of this evaluation. It will therefore be recommended that he is competent to stand trial."

Sound familiar? The frustration of being unable to effectively communicate with one's client sufficiently to mount a viable defense because of the certainty that he/she is incompetent to stand trial can only be exceeded by the frustration of the prosecutor's psychological/psychiatric expert(s) opining to the contrary. That is, although the defendant's competency, as in the case above, was initially questionable, thanks to "training" the defendant has now demonstrated sufficient information, not to mention cognitive capacity, to apply this newfound knowledge as well as show reasoning and judgment, short and long term memory, emotional stability, and attention and concentration in dealing with the rigors of a full blown trial – all of this based on parroting the right answers after a lapse of only 90 minutes!

Attorneys typically have doubts about their clients' competency to stand trial, usually because of mental retardation, neurological trauma, or mental illness, in 8 to 15% of all felony cases although they actually only raise the issue of competency less than half the time (Hoge, Bonnie, Poythress, Monahan, Eisenberg, & Feucht-Haviar, 1997). This is about 60,000 competency evaluations performed annually in the United States (Bonnie & Grisso, 2000). On the average, 30% of defendants referred for evaluation are deemed by the courts to be incompetent, with this statistic varying widely across jurisdictions (Melton, Petrila, Poythress, & Slobogin, 1997).

Although mental health examiners offer opinions about a particular defendant's competency, it is the courts, of course, who actually make the decision, with studies showing that the courts agree with the examiners' conclusions between 90% and 99.6% of the time (Cruise and Rogers, 1998; Zapf, Hubbard, Galloway, Cox, and Ronan, 2002). This suggests that the conclusions reached by examiners, including those based on competency restoration training (also known as "back end evaluations," to be distinguished from "front end evaluations") have considerable significance.

It often seems that the mere provision of information relevant to the legal system is seen as a cure-all to competency restoration, such as the example at the beginning of this column. In contrast, a state examiner with whom I spoke told me he tends to look more at the defendant's trust/mistrust of his attorney as a defining factor as opposed to actual knowledge and comprehension of the judicial system, with a training program, if indicated, tailored to the specific individual's needs. This clinician's predictions of competency restoration are geared to such things as how long the person has been off his medication.

These wide differences in where evaluators place their emphasis in determining whether a defendant has been restored to competency or is restorable at all are likewise reflected in the literature of predicting competency restoration. While Golding (1992), for example, indicates that poor premorbid functioning, prior psychiatric history, and other clinical factors are the best predictors of response to treatment and hence competency restoration, Carbonell, Heilburn, and Friedman (1992) suggest that clinical variables are actually poor predictors. Such divergent conclusions have led some researchers to opine that evaluators are unable to predict with any degree of accuracy which defendants can and cannot regain competency (Roesch & Golding, 1980).

Interestingly, a recent study (Hubbard, Zapf, and Ronan, 2003) found few significant differences between defendants predicted restorable by mental health examiners and those not restorable, with those differences that did exist primarily related to non-clinical variables. For example, incompetent defendants with a criminal history were more likely to be predicted restorable, while those without a criminal history were more likely to be predicted as not restorable. Incompetent defendants charged with murder were more likely to be predicted as restorable, with the researchers questioning the likelihood of examiners being subjected to political pressure to have violent offenders prosecuted. Incompetent defendants able to understand the workings of the criminal justice system were significantly more likely to be predicted as restorable, as were younger defendants.

While there is this growing body of literature, with no clear consensus, as to which variables are predictive of competency restoration, there is very little research to date on the effectiveness of competency restoration training per se, including, as in the example above, of a defendant of questionable competence at the beginning of the evaluation who was then deemed competent by the end of the assessment a short while later. One of the few studies (Anderson & Hewitt, 2002) examining the effects of competency restoration train-

ing on mentally retarded defendants previously found not competent to stand trial in the "front end" evaluation found that only 1/3 of these defendants were found competent in the "back end" evaluation.

So, can we actually assert that competency restoration training is effective? Can a person who is re-tested 90 minutes after having earlier failed to demonstrate competency now confidently be considered competent, having been given information about the legal process that theoretically she or he simply did not have before, presumably out of mere ignorance?

Maybe, but a finding in the admittedly minimal research that does exist is that this is far less than 100% of the time (Roesch & Golding, 1980; Anderson & Hewitt, 2002). Sometimes defendants legitimately do not know certain things about the judicial system, with their mental faculties such that having been provided this information through lecture, videotape, role playing, and so forth, they can now process it intelligibly and be reliably counted upon to remember it weeks and even months later, whenever their trial takes place. That is, they are able to coherently testify on their own behalf, understand the prosecutor is not their friend, have some legitimate sense of whether witnesses are being truthful, and are sufficiently aware and intact that they can appropriately communicate this to their attorney.

However, Alabama psychologist Kathleen Ronan, a major researcher in the field of competency and competency restoration, in a personal communication told me that a movement is afoot within the field of psychology, at least partially in response to attorney input, to look at more than just the intellectual component of competency, i.e, the defendant's ability to parrot back the right answers. In addition to intellect, we are beginning to evaluate the client's *appreciation* of competency-related issues as well as his *reasoning processes* - the defendant's *functional* ability.

That is, training to restore someone to competency needs to be such that the individual can demonstrate the ability to know the germane issues involved in standing trial, be able to manipulate this information appropriately, apply that knowledge to the specifics of his case, and make rational and logical decisions regarding trial issues. Any evaluator of competency or competency restoration, stated Dr. Ronan, regardless of what side hires her, needs to be able to answer this question: "How do you know the defendant is not simply parroting back what you have told him rather than truly understands the legal issues and can apply them?" The mental health examiner's response should be, "Because I have done a functional analysis of his competency and I am basing my opinion on these specific procedures I utilized, which are…"

In addition, the fact that the defendant's short term memory lasted 90 minutes on any one particular day sufficient to parrot correct answers, aside from saying nothing about his ability to appreciate competency-related issues and demonstrate reasoning, is no assurance that that person can focus for hours at a time during a trial or will remember 90 minutes later what she heard someone attest to earlier. Simply eyeballing a person will not tell the attorney, a psychologist, or anyone else whether that individual is actually tracking the proceedings with any degree of lucidity or comprehension.

In the absence of psychological testing to determine intelligence and the all important memory abilities, without a thorough review of medical/psychiatric records to ascertain premorbid psychiatric history and such things as whether the person suffers from dementia and/or a major psychiatric disorder, and lacking interviews with friends and family members who can provide such essential information as the defendant's ability to track a conversation, pay attention to even a short television program, remember events from both long and short term memory, and so on, that expert's opinion of restoration to competency can legitimately be challenged.

In short, the downside is that to date there is scant knowledge that helps us determine the treatability of incompetent defendants such that we know who can be restored to competency, when, or by what means. On the positive side, however, psychologists are now reaching the conclusion that we have not been looking at competency and competency restoration the right way. We are in a state of transition, being in the process of establishing a data base that will eventually be able to address competency in a more definitive, helpful way. We are developing new tests, such as the MacCAT-CA (MacArthur Competence Assessment Tool – Criminal Adjudication), which assesses not just intellectual knowledge of criminal proceedings but also appreciation and reasoning pertinent to competency to stand trial.

Now it will be up to the courts, in response to mental health examiners' newly expanded testimony (hopefully) on the factors legitimately constituting competency and what can and cannot be demonstrated by research, to re-define what constitutes an adequate competency assessment.

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Dr. McCoy specializes in death penalty mitigation. For further information, including a bibliography on mitigation and other articles written by Dr. McCoy, please visit her website, www.forensicpsychpages.com.

ED MONAHAN: A SERVANT OF JUSTICE

"I am the son of a corner grocer." To know Ed Monahan, you must at least know that. He grew up in humble circumstances, and he has never forgotten that. No matter whether he was addressing 400 public defenders or talking to a legislative committee or to the Sixth Circuit Court of Appeals, he was and is the son of a corner grocer, a grocer who longed to be and could have been a great lawyer himself. Well, his son was and is that great lawyer. Ed's background as the son of Ed Monahan, a grocer and past mayor of Ludlow, and Marie, his wonderful nurturing mother, is crucial to understanding who Ed is, and why he is. The streets of Ludlow, a blue collar northern Kentucky city, the parish church, the little ball park next to the river, Ed's living quarters above the grocery, all are ingrained into the Ed Monahan who has been my colleague, my partner in this journey of justice, and my friend.

Ed is leaving the job that has defined him some time late this summer. He is now carrying two jobs, the Executive Director of the Catholic Conference and Deputy Public Advocate. As he is in the process of leaving, I wanted to share with the readers of *The Advocate* some of the ways in which I have known Ed over the past 28 years.

A Masterful Advocate for the Poor

Ed is first and foremost a public defender, an advocate for the poor citizen accused. He has been that since he came to OPA as a law clerk in 1975, and he will be a public defender long after he has left OPA.

My first job in the fall of 1976 was as a law clerk for Ed Monahan. I was immediately impressed with his commitment to helping poor people who had been caught up in the criminal justice system. I was impressed that this quiet scholar who was absolutely committed to the faith of his childhood was also committed to working for the least among us, accused and convicted and despised criminals.

I have had the privilege of watching Ed and working with Ed to obtain relief for many clients over the years. In late 1978, Ed and I were assigned the case of Eugene Gall, who was one of the first persons sentenced to death under the new death penalty statute. Ed and I prepared an enormous (too long!) brief to the Kentucky Supreme Court, and lost. We lost again at the Supreme Court and then again at the trial court on 11.42. We continued to lose at every level. Ed kept the faith. He continued to believe in the issues that we had identified as young lawyers and continued to develop as we brainstormed and investigated and litigated. Eventually, 23 years after we began, after thousands of hours of work apiece, we obtained relief for Eugene, who is now serving a life sentence in an Ohio prison. Not only did Ed provide excellent legal representation during this process, but also over 23 years Ed never failed to communicate with Eugene about what was happening. Throughout the case Ed brought hope

and dignity to this death row inmate. I'll never forget that example of how to be a lawyer standing beside a client faced with death.

Ed also represented Taylor Mill resident Paul Kordenbrock at both the trial and post-trial levels. After Paul received death at trial, Ed stayed on the case through appeal and into federal court. In 1991, the Sixth Circuit Court of Appeals overturned Kordenbrock's conviction, and he agreed to a life sentence negotiated by Ed in 1991.

Ed Monahan ..... through the years.

In 1986, a trial judge imposed a death sentence after having pledged to sentence my client to life. In 1988, Ed agreed to represent Randy Haight on appeal. Along with Ken Taylor and myself, Ed obtained a reversal of that death sentence.

After I lost a case at the trial level where the judge had refused to appoint a mental health professional, Ed agreed to take on the case on appeal. Charles Richard Binion obtained relief as result of Ed's excellent representation, and *Binion v. Commonwealth* still stands as good law on the right of an indigent to receive funds to assist him in presenting a mental health defense.

In 1981, Ed defended Jackie Wiley with me on a capital murder charge in McCracken County, obtaining a nondeath verdict. In 1983, he defended Robert Crawford in Leslie County, and obtained a nondeath verdict. He represented Elzie Morton with me in Fayette County in 1986, and again obtained a nondeath verdict. In 1986, he also represented Kevin Fitzgerald with Bette Niemi in Carroll County and obtained a manslaughter verdict. In 1994, he along with Kelly Gleason obtained a life plea in the Fred Grooms retrial.

These are just the most memorable cases that I know about in which Ed represented a poor client and obtained relief for him. Believe me, there have been many, many more. Throughout Ed's career, he has been client centered, and taught many of us how to keep the client first and foremost.

The Creator of Kentucky's Education Program

It is said throughout the country that Kentucky has the best education program among all public defender organizations in the United States. If that is true, and I think it is, the reason is Ed Monahan.

Ed served as the OPA's Director of Education and Development from 1980-2001. It is impossible to summarize all that he has done to educate Kentucky and United States public defenders and leaders. He created the first Kentucky capital punishment seminar. He created the Litigation Persuasion Institute first held at EKU in Richmond in the early 1980s, and has continued to plan and implement this excellent week-long training seminar ever since. He created the tri-annual Capital Litigation Persuasion Institute. He created New Attorney Education, now a 3-4 week long education for our new attorneys that in the first year ensures exposure to every seminal area of criminal law. He has planned and implemented every Annual Conference since 1980.

One of the things that is most notable about Ed is how he keeps his eyes and ears out for topics on which we need training. It is almost a Sixth Sense. Ed is aware of the winds that are blowing in criminal defense, bringing to our attention the need for education on *Daubert*, on forensic science, on mitigation, on performance standards, on coaching, on the racial justice act, and on many other areas of cutting edge litigation. I don't know how many times I've winced at a topic upon which training was occurring because I didn't think it would be well received, after which I attended and wondered why we hadn't received that training before.

For years, Ed has been the expert on the right of indigents to receive funds for expert witnesses. Years ago, Ed put together a manual that included arguments and cases on virtually every expert a defense lawyer might need. He has taught many of us why our clients need experts, how to obtain experts, and how to use experts when we get them.

Ed knows everybody. He has done favors for everybody. That's why when Ed calls national leaders in litigation, they want to come to train in Kentucky. His institutes at Faubush routinely resemble the National Criminal Defense College Faculty. They don't come from around the country because of Faubush…they come because of Ed.

An Excellent Writer

Ed is an excellent writer. He always has an article in process. His interests range from fundamental criminal defense practice to leadership, management, supervision, coaching, and other areas. Some of his publications include: *Deciding to Train for Quality Service: Quality is the Only Acceptable Standard*, published in 1992 in the NLADA *Cornerstone*, *The Fiend Unmasked: Developing the Mental Health Dimensions of the Defense*, co-authored in 1993 with James

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Clark and Lane Veltkamp, published in ABA Criminal Justice, *Coaching Defenders: Developing a Helping Relationship*, published in 1996 in NLADA's *Cornerstone*, *Preparing the New Law Graduate to Practice Law: A View from the Trenches*, co-authored with Rodney Uphoff and James Clark and published in 1997, and *Strategic Planning for Defender Organizations: Creating our Future the Common Sense Way*, published in 1998 in the *Cornerstone*.

Ed doesn't write just to be published. His writing has a mission, a vision, if you will. His writing has been directed at increasing the capacity of Kentucky's public defenders, and improving the criminal justice system.

A Respected National Defender Leader

Mention Kentucky to people outside the state in indigent defense, and they will ask about Ed Monahan. Ed has put Kentucky on the map.

Ed helped to establish the Trainer's Section of the National Legal Aid and Defender Association. He was Vice-Chair from 1990-1999, and has served as Co-Chair since 1999. He has advised trainers in public defender programs around the country on how to set up training programs that work.

Ed has served as a defender training evaluator throughout the country. He has either been on the faculty or served as an evaluator in West Virginia (1985), Riverside, California (1989-1992), Missouri (1991), Wisconsin (1993), New York (1994), among other places.

He has been active as a consultant to public defender programs across the country. Among the many times he has volunteered his time to train others, he was asked to go to North Carolina to help them set up their public defender program. He likewise was asked recently to go to Virginia to help their Commission address serious issues in that program. He trained on media relations at the NLADA Defender Management Training Conference in San Diego in 1995. He trained on brainstorming at the New Mexico Public Defender's Annual Training in 1992. He trained on critiquing defender performance at the 1992 NLADA Annual Conference. He trained on coaching skills, and compassion fatigue at the 1996 NLADA Defender Management Training Conference. He has trained defender managers in the Knoxville, Tennessee public defender program. He has served as a trainer at NLADA's Appellate Defender Training, as well as an educator on habeas practice in New York.

Ed Monahan (r) receiving the 1998 Gideon Award from Ernie Lewis (l)

One area of expertise that Ed developed has been in the area of strategic planning. He developed OPA's first strategic planning process, and has helped every year since 1989 to plan and implement strategic planning. He taught strategic planning for Wisconsin Defenders in 1992 and Tennessee Defenders in 1995.

Ed was recognized with the NLADA Defender Services Award in 1987 for outstanding performance and accomplishments as an assistant public advocate and training director. He was also given the KACDL Presidential Award for Outstanding Contribution as Education Chair in 1992.

In 1998, I gave Ed the *Gideon Award*. That is the oldest and most widely respected award given at OPA. Ed personifies what I have looked for to be the recipient of that award.

A Person Committed to Improving the Criminal Justice System

One of Ed's passions is the improvement of the criminal justice system. He has an inherent sense of procedures that are fair and work and those that oppress and result in unfairness. He has worked to translate that passion into concrete action.

Ed helped to organize the Kentucky Association of Criminal Defense Lawyers. He was one of the core group of attorneys there at the beginning of this organization. He has served on the board since 1987, and has served as Treasurer and Education Committee Chair. He recently reassumed the Chair of the Education Committee even after he agreed to become the Executive Director of the Catholic Conference.

Ed has been the leader in Kentucky in advancing our criminal rules. For many years, Ed has solicited from all Kentucky public defenders their ideas on what criminal rules are working, and what rules are needed. He has used those ideas to put together some of the best rules proposals received by the Kentucky Supreme Court. Many of Ed's rules have been adopted eventually by the Court, including the rule on a required instruction on guilty but mentally ill.

Ed has served on the KBA Ethics Committee since 2000. He has advanced criminal defense perspectives before this sig-

nificant committee. He has helped educate all of us on what our rules of professional responsibility demand of us.

He has served on the Kentucky Governmental Services Advisory Committee for the Certified Public Manager Program since 1994. In this capacity, he has worked with other parts of state government to ensure that public servants are educated in the best way possible.

He Helped Pass the Racial Justice Act

One of the most visionary pieces of legislation that has passed over the past 20 years in Kentucky has been the Racial Justice Act. This act was born in *McKlesky v. Kemp*. Thereafter, a coalition began to meet in 1992, and in subsequent sessions of the General Assembly, the act was discussed, considered, but not passed. Ed was a leader of this coalition, and eventually he successfully quarterbacked its passage in the 1998 General Assembly as Senate Bill 171, the Racial Justice Act in 1998. And then, characteristically, he developed education surrounding it.

A Trusted Deputy

The first thing I told my new Cabinet Secretary in 1996 when I was appointed Public Advocate was that I could not succeed unless I had Ed Monahan as my Deputy Public Advocate. What I have accomplished has been in no small part because of my partnership with Ed Monahan. Ed was a significant part of the team that envisioned the *Blue Ribbon Group on Improving Indigent Defense for the 21st Century*. Ed was an important leader in the AOC/DPA Workgroup that produced a most significant report in both pretrial release and indigency standards. Ed wrote the loan assistance bill, along with others, that became HB 483 this year. Ed wrote the draft of KRS Chapter 31 that passed in 2002, and that included the *ex parte* hearing as part of the process for procuring expert funding. Ed has been part of every major decision that I have made in almost 8 years as Public Advocate. Except for the bad ones.

The Editor of the Advocate

In 1978, then Public Advocate asked me to start *The Advocate*. I began to edit *The Advocate*, and produced a newsletter six times a year until I moved to Richmond in 1983. That's when Ed became the Editor, and that's when *The Advocate* took off to become the top criminal justice publication in Kentucky. Most parts of Kentucky's criminal justice system rely upon *The Advocate* not only to update them on what cases are current in state and federal court, but also on what other issues are developing importance. Through this mechanism, Ed Monahan has single-handedly made *The Advocate* OPA's voice for a more compassionate criminal justice system.

An Ardent Opponent of Capital Punishment

One of my first projects with Ed was the planning of the beginning of education on capital punishment. In that first seminar, held at Shakertown, he attracted Jim Liebman and Millard Farmer to explore our new death penalty statute. Later, he attracted Morris Dees, Dennis Balske, John Carroll, Bryan Stephenson, Andrea Lyon, Steve Bright, Mark Olive, John Blume, Kevin McNally and many others in the pantheon of this country's death penalty bar. Ed has been Kentucky's leader in education, legislative advocacy, and litigation in the area of capital punishment. Ed was one of the drafters of the bill to abolish the death penalty for persons with mental retardation.

In the last 8 years, Ed has been the leader of a coalition working together to abolish the death penalty for children. He has drafted the bill many times, and continues to draw together a broad group of people who each session advocate for this bill. He and I continue to believe that one day this penalty for children will be abolished if not first declared unconstitutional by the United States Supreme Court.

A Believer in the Power of Interdependence and Coalition Building

Public defender organizations used to feature the mentality of the lone wolf, the champion for the poor, opposed to judges, prosecutors, and everyone else who stood in the way of justice. Ed was one of the first of us to see that continuing with that approach was no longer going to work. He has led OPA into seeing things from different perspectives. He has helped me to develop a better understanding of the important of working collaboratively with all parts of the criminal justice system. He has a broad network of people throughout Kentucky and the nation that understand that we can only move forward if we relate to and work with all parts of the system.

A Servant Leader

Ed believes in leadership. He believes that leadership is necessary in order to get anything accomplished. He educates on leadership, and he lives leadership. He has done more than anyone I know to help defenders become better leaders. Ed's view of leadership is not that it is needed to advance one's career. Ed has never, ever advanced himself on the back of anyone else. Rather, Ed is the prototype of the servant leader. He leads by example. He leads by humbling himself, advancing others, providing information, working with groups to get their interests out in the open, and above all, serving others.

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A Humble Family Man Who is Centered in Faith

Ed lives in Lexington with his wife, Diane, a therapist, and their children Lauren, a sophomore at Lexington Catholic High School, and Megan, an eighth grader at Mary Queen school. They are members of Mary Queen of the Holy Rosary Catholic Church.

Being a public defender is hard on a person, and hard on that person's family. Ed is a good father and a good husband. He has worked hard to balance being a committed public defender and a good family man. He has stayed centered on what is important in his life, and places faith and family at the core.

Executive Director of the Catholic Conference

In many ways, becoming the Executive Director of the Catholic Conference is a natural culmination of a wonderful career. He attended St. James Parish elementary school and St. Xavier High School in Cincinnati. He graduated from Thomas More College in Crestview. The Columbus School of Law at Catholic University of America in Washington, D.C. provided Ed with his legal education. While there, Ed was a staff member and ultimately the associate editor of the Law Review. Ed's sister, Sister Marla Monahan, teaches at Notre Dame Academy in Park Hills.

Ed became the Executive Director of the Catholic Conference of Kentucky on March 1, 2004. He followed Jane Chiles and Vince Senior in his position. Fr. Pat Delahanty said of Ed that he "will help CCK promote the common good for all Kentuckians. As a lawyer, he gained experience in the public policy arena by working with legislative coalitions; and, as someone whose faith is very important to him, he will be a convincing advocate for the Gospel values and the social justice teaching of the Catholic Church."

He is Appreciated Far and Wide

Brian Ruff, LaGrange Post-Conviction Directing Attorney: "Ed, we will all miss you. I want you to know that I have learned so much from the wonderful training you have so carefully put together throughout the years that it is difficult to express to you how much it has benefited my practice. In many ways I feel like law school taught me how to research and write briefs but DPA training taught me how to practice real law in a courtroom and also helped me to reconcile being an analytical lawyer and a compassionate person at the same time. This is a gift that many lawyers in the public sector and in many government agencies never learn. Thank you for being a friend, a mentor of countless public defenders like myself and most of all thank you for helping all of us to learn to be both tough lawyers and righteous, decent human beings at the same time.

John Delaney, Boone County Directing Attorney: "The church is lucky to get you. Their gain is DPA's loss. You have done great and meaningful work at DPA and I am sure you will continue with that for the church."

Jim Cox, Somerset Directing Attorney: "I wanted to express my gratitude for all the good work you have done. I have greatly benefited from all the good training I have received over the years. I will miss you. Good luck in the future."

Peyton Reynolds, Hazard Directing Attorney: "Ed, I will miss you. You are a prince. This is a real opportunity to be of service to the church, something I intend to do upon retirement."

Bette Niemi, Capital Trial Branch Manager: "I am very saddened by this news but am very happy that you will be a position in which you will continue to influence the hearts and souls of others. You have made a tremendous impact on how public defenders practice throughout the country. If you hadn't taken me under your wing years ago and given me the learning and training opportunities that I have had, I would have been lost. For all of the negative aspects of capital punishment the one positive is that it brings two attorneys together in a way that is impossible to describe or forget. Kevin Fitzgerald's case was an experience that will live with me forever because of you. Congratulations and I wish you the very best in this new journey."

Scott West, Murray Directing Attorney: "Ed represents the Platonic Form of Professionalism and Excellence, and has been a model for young lawyers and old lawyers alike. For Ed, it has never been sufficient that DPA lawyers treat their clients with dignity and respect; he has devoted much of his life and career to teaching public defenders how to ensure that the legal system treats our clients with the same dignity and respect. 'Good enough' is never good enough for Ed. With this new appointment, Ed's ministry does not come at an end, but takes a new direction. As those who are about to benefit from Ed's service and leadership will soon learn, Ed's commitment to task and the brisk stride with which he carries it out will take them further along the path to their goals than they imagined, and sooner than they expected. We will miss you, Ed. I want to thank you personally for giving me opportunities to write for *The Advocate*, and for your support of me over the last few years. With your commitment to training and professionalism, you have helped bring prestige to DPA, and all of us who work for DPA have benefited thereby."

Susan Balliet, Post-Conviction Supervisor: "This must be the end of an era. I didn't become formal staff of DPA until 1998, but certainly already knew the name Ed Monahan long before that, from conferences and trainings. Thank you, Ed, for your kind contributions to my education as a public defender. Best wishes to you in your new position."

Roger Gibbs, Eastern Regional Manager: "I want to take a moment and say thank you. From the first time I had an opportunity to be trained by you as a brand new lawyer until the present day, I have looked to you as one of the leaders in DPA that made us what we are. You have always called on us to do better and to reach higher. You will be missed. I trust that your new calling will prove as rewarding as this one has been. Take care."

Ernie Lewis, Joel Pett, & Ed Monahan

Jeff Sherr, Education and Strategic Planning Manager: "I could not have asked for a better mentor. Ed, in his patient and gracious way, has created an environment for me to succeed, allowed me to make my own little mistakes, guided me away from big ones and allowed me to add my own input to his creation. I am truly in his debt."

Dan Goyette, Chief Public Defender, Louisville-Jefferson County Public Defender's Office: "Ed's contributions to the development of the statewide public defender system in Kentucky rank among the most notable since the passage of KRS Chapter 31. His leadership in the area of defender training alone has had a more pervasive impact, and will have a more prolonged effect, on the quality of indigent defense, both here and around the country, than any other initiative undertaken by OPA. While we may not have agreed on all matters during his 28 years of distinguished service, I always found his decision-making to be principled and based upon an unwavering commitment to the defender mission above all else. He understood the requirements and demands of leadership and was willing to make the personal and professional sacrifices necessary to lead effectively and honorably. Given the many roles and responsibilities he so ably performed and discharged for DPA, Ed will be very difficult to replace, at least by one person. Most certainly, he will be sorely missed by all those who worked with him and benefited from his devotion to the department."

Mary Jane Cowherd, a respected counselor in state government, says "What a loss to state government. We will miss you!"

From Ed Monahan

Ed wrote an e-mail on December 17, 2003, announcing his decision to leave public defender work during 2004 and assume the Executive Director job at the Catholic Conference. I wanted to share some of his words with the reader:

"This has been the job of my dreams. I am privileged to be a public defender, representing those in great need, working to evidence the humanity of those we represent…quite noble in a culture that values power, position and wealth. …I have been blessed with the help of colleagues who have cared about helping me get better at what I did and cared to help me represent clients well. I have learned from so many at DPA through my 28 years….I leave with many thoughts and feelings. I did not intend to depart being a public defender at this point. However, a short number of weeks ago I was unexpectedly asked to consider the position at the Catholic Conference, which is the public policy arm of the Kentucky Catholic Bishops. I have worked over the years with the Executive Directors of the Conference…I respect their work and their fundamental commitment to working to proclaim the Catholic social justice doctrine in Kentucky's public policy. The Catholic Conference has worked to advance many things defenders have supported, legislation to abolish and limit capital punishment, increased funding for DPA, the Racial Justice Act. They have supported efforts to commute death sentences, improve services for the mentally ill, and seek a fair and balanced criminal justice system. I am giving up working as a full-time public defender…This is a magnificent opportunity I did not expect to be offered that will allow me to do good work for my faith, which is important to me, with a high level of support from the Catholic Bishops. Being a public defender has been very meaningful work for me. I recently received a card from the Fellowship of Reconciliation with a quote from *A Testament of Devotion* by Thomas Kelly that for some reason resonated with me: 'In faith we go forward, with breathtaking boldness, and in faith we stand still, unshaken, with amazing confidence.' I will greatly miss DPA and working with you. Thanks for helping me so much over the years."

Conclusion

Go in peace, Ed. You will be missed greatly by Kentucky's public defender community. Your legacy here, however, will live long past your departure.

Ed loves quotes from wise people. Here's one that perfectly describes this man.

"People have no idea what one saint can do."
-- Thomas Merton ■

Ernie Lewis
Public Advocate

IN THE SPOTLIGHT ... MIKE PARKS

"Never assume the obvious is true."
- William Safire

Mike knew things did not add up in the Larry Osborne case. The appeal had been won and now a trial team gathered to retry the case. Asked to investigate, he looked over the evidence. The prosecution claimed that Larry had snipped electrical wires to the house and the wire cutters were found at his home. Knowing the wires were energized when they were cut, Mike conducted several field tests. Using wire cutters identical to those found at Larry's home, he cut live wires repeatedly (do not try this at home) and found that the electrical contact marked the cutters every time. The wire cutters at Larry's house were unmarked. Larry Osborne is now a free man thanks to the efforts of the entire trial team and also in large part to Mike Parks' investigation skills.

Mike's instincts are good. They served him well through 7 years on the police force and extensive experience fighting fires. They are the instincts of someone who does not accept the "obvious." They are the instincts of someone with pit-bull tenacity for digging out the truth. They are the instincts commonly found in Public Advocacy's investigators.

Diana Queen, another extraordinary investigator with the Kentucky Office of Public Advocacy and an advisory board member of The Criminal Defense Investigation Training Council (C.D.I.T.C.), says, "Mike is a devoted and professional investigator who I am proud to be his colleague and friend. Mike is constantly pursuing training opportunities which further his investigative knowledge. He is a part of the new generation of criminal defense investigators which bring highly specialized skills and abilities to challenge charges which are brought against the accused. His investigative aptitude and tenacious pursuit of the truth are certainly invaluable to the attorneys and clients whom he works with. No doubt he makes a large impact on the cases in which he is involved. Mike is simply one of the best in our agency."

Name a certification and Mike is likely to have it. He received his investigation certification through C.D.I.T.C. at Public Advocacy's Litigation Persuasion Institute in 2001. He has been a Kentucky Certified Firefighter since 2002 and is also certified through the International Fire Service Accreditation Congress (IFSAC) for Firefighter 1 and 2 and Hazardous Materials Awareness and Operations. He is a certified State Fire Service Instructor, a National Association of Fire Investigators (NAFI) certified Fire and Explosion Investigator and Investigation Instructor and a Kentucky Carry Concealed Deadly Weapons Instructor. He also conducts investigator training at Public Advocacy's Annual Conferences. Mike says of the additional training he pursues, "It makes me a better investigator – to be versatile like that."

Preparation and the willingness to take action also describe Mike Parks. He laughs about his "investigator-mobile," his truck filled with his own accumulated equipment. Roger Gibbs, Eastern Regional Manager and Mike's immediate supervisor, recounts, "Mike has demonstrated unique abilities to find people that do not want to be found, to uncover facts that are hidden and assist the defense team with innovative solutions. At one crime scene, the Commonwealth and the defense were going to video a demonstration. When one officer was asked to go in the high weeds, he declined due to the possibility of snakes. Mike got out his 'snake' boots and went on with the demonstration. He is fearless and comes prepared for just about any contingency that might occur."

For their work on the Osborne case, Mike and the rest of the trial team received the Furman Award at Public Advocacy's 2003 Annual Conference. There aren't enough awards in the world, though, to thank Mike for his dedication and perseverance. It seems obvious to him why anyone would pursue this work. In his quiet, matter-of-fact manner, Mike responds, "Everybody is entitled to a defense and I've seen a lot of people who weren't really guilty of what they were charged. It's a way of giving back to the community. I just like doing it. It helps people." ■

Patti Heying
Program Coordinator

KENTUCKY CASE REVIEW

Walker v. Commonwealth
(2/19/04)
Affirming in Part, Reversing in Part, and Remanding

Kevin Walker is a bail bondsman from Ohio, hired by a company to apprehend Allen Barkley. Barkley moved from Ohio to Kentucky. Walker and other fugitive apprehension agents found him in Kentucky and attempted to take Barkley into custody. Kentucky police arrived at the scene. Since Walker had no arrest warrant, the Kentucky officers freed Barkley and arrested Walker. A jury convicted Walker of assault, fourth degree; wanton endangerment, second degree; and "bondsman detaining without a warrant." Walker appealed to the Kentucky Court of Appeals. The Court of Appeals affirmed the convictions but remanded for re-sentencing, finding that the court did not give due consideration to probation. The Kentucky Supreme Court granted discretionary review.

Kentucky abolished the bail bondsman industry. However, KRS 440.270, part of the Uniform Extradition Act, permits bondsmen from other states to make recoveries inside Kentucky. The statute requires the bondsman first obtain an arrest warrant.

Walker raised a number of constitutional challenges to KRS 440.270 et al., to wit: violations of the Full Faith and Credit Clause, the Commerce Clause, the Equal Protection Clause, and the Due Process Clause.

KRS 440.270 does not violate Full Faith and Credit Clause. On appeal, Walker argued that since Ohio law gave him the authority to arrest a fugitive without a warrant, Kentucky must give full faith and credit to Ohio law. The Supreme Court noted that no state is required to adopt the laws of another state which conflict with their own. The Court held that 440.270 does not prevent Ohio from recovering a fugitive in Kentucky, rather the statute merely sets forth the necessary procedure for such recovery.

KRS 440.270 does not violate Interstate Commerce. The Court held that the statute afforded fugitives from bail a minimum of due process, ergo it only remotely and indirectly regulates the interstate business of bail bonding. As such, the statute is not unconstitutional.

KRS 440.270 does not violate Equal Protection. In this case, KRS 440.280 does not permit a private person to Barkley. The statute only permits arrest of a person charged with a felony. Barkley was charged with misdemeanors. And, the Court found that the purpose of KRS 440.270 is to prevent vigilante style apprehensions. Thus, there exists a rational basis for the discrimination. As such, there is no equal protection violation.

KRS 440.270 does not violate the Due Process Clause. Walker argued that he did not have fair notice that his conduct in Kentucky was criminal. The Court held that fair warning violations occur when "an unforeseeable state court construction of a criminal statute is applied retroactively to subject a person to criminal liability" and when there are changes in common law principles that are "so unexpected and indefensible by reference to the law which had been expressed prior to the conduct in issue." The Court held that neither occurred in this case. The Court was merely interpreting the plain and unambiguous language of the statute.

KRS 503.040, execution of public duty statute, did not justify Walker's conduct. Walker argued that the execution of public duty statute permitted him to arrest Barkley. The Court held that the Ohio court order under which Walker claimed authority to apprehend Barkley did not specifically permit an arrest. Moreover, the Court noted that the police chief issuing the *capias* for Barkley was without authority to execute it outside the jurisdiction where it was issued. The Court held the police chief could only obtain Barkley's return through KRS 440.270.

Walker was not entitled to an instruction on justification. A justification instruction is permissible when a mistaken belief, here the ability to arrest, is a result of a lack of jurisdiction of the court or a defect in the legal process. Here the Ohio court order simply did not permit an arrest.

The trial court erred by failing to give a mistake of law instruction. The Court reiterated the age old adage that ignorance of the law is no excuse. However, the Court noted two exceptions in KRS 501.070. First, mistake of law may negate the culpable mental state. Second, mistake of law excuses liability for acts committed in reliance upon official but erroneous statements of the law.

The Court held that a violation of KRS 440.270 (2) would require at least a minimum of reckless intent. Walker testified that he intended to detain Barkley and knew that a warrant for arrest had not been issued. His only mistake of law was that he believed the detention was lawful. The trial court correctly held that the first exception did not apply. At trial, Walker contended he relied on language from *Taylor v. Taintor* ("for the purpose of surrendering the defen-

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dant, the bail may at any time or place, arrest him …"). The Court noted that the standard under this exception is a subjective one. Since Walker believed that *Taylor* permitted the arrest, the trial court erred by not instructing on mistake of law.

Hampton v. Commonwealth
(2/19/04)
Affirming

Hampton appealed her 55 year sentence based on convictions for murder and tampering with physical evidence. This was Hampton's re-trial following a reversal and remand by the Kentucky Supreme Court.

Lay witness testimony permitted on subject of whether victims signed certain documents. The Court found no fault with the testimony of a loan officer that in her opinion the victim in this case did not sign the loan documents. The testimony was based on her personal observation and was helpful to the jury. Ergo, the testimony fell within KRE 701 which permits a nonexpert witness to express an opinion which is rationally based on the perception of the witness and is helpful to a determination of fact in issue.

Conduct that resulted in acquittal admissible under KRE 404 (b). Hampton was initially also charged with cruelty to animals. At the first trial, the trial court directed a verdict on this charge. At the re-trial, Hampton argued that the prior charge was not admissible in the murder case because of the acquittal. The Supreme Court held "acquittal in a criminal case does not preclude the Government from relitigating an issue when it is presented in a subsequent action governed by a lower standard of proof." According to the Court, this evidence was proper under the lower burden of proof required for admissibility under KRE 404 (b). Overruling *Commonwealth v. Hillebrand*, Ky., 536 S.W.2d 451 (1976).

Donahoo v. Commonwealth
(2/19/04)
Affirming

Donahoo appealed an order of the Court of Appeals denying a writ of prohibition of his trial on a pending felony indictment. Donahoo alleged that he was not brought to trial within 180 days after he filed a request pursuant to KRS 500.110.

The Kentucky Supreme Court defined "detainer" finding that one was not issued in this case. Roederer Correctional Complex received only a copy of the felony indictment against Appellant. The Court found no evidence in the record that any criminal justice agency ever asked a Kentucky correctional institution where Donahoo was incarcerated to hold him at the conclusion of his sentence and/or to notify it when Donahoo's release was imminent.

The Court also held that either the district court or the circuit court may file a detainer against an inmate as they are within the context "criminal justice agencies." ■

Euva D. May
Assistant Public Advocate

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6TH CIRCUIT CASE REVIEW

Emily Holt

U.S. v. Crayton
357 F.3d 560 (6th Cir. 2/5/04)

Crayton was convicted of attempt, conspiracy, and possession of over 5 kilograms of cocaine with the intent to distribute in his second trial in federal district court in Louisville. In his first trial Crayton was tried with co-defendant Alexander who was acquitted of all charges, but the jury could not reach a verdict as to Crayton.

Rule of consistency no longer good law. The Court first rejects Crayton's argument that his convictions violate "the rule of consistency," which provides one co-conspirator cannot be convicted when all other co-conspirators are acquitted at the same trial. *U.S. v. Walker*, 871 F.2d 1298, 1304 n. 5(6th Cir. 1989)(dictum). In *U.S. v. Powell*, 469 U.S. 57 (1984), the U.S. Supreme Court rendered the law of consistency no longer good law. In *Powell*, the Court, relying on the rationale that inconsistent verdicts are often the product of jury lenity, held inconsistent jury verdicts were permissible. *Id.*, 469 U.S. at 68-69. While *Powell* itself did not involve inconsistent jury verdicts among co-conspirators, every circuit, except the 10th Circuit, has recognized the rule of consistency does not survive *Powell*.

No *Brady* violation where material given to defense in time for use at trial. The 6th Circuit also finds no *Brady* error, *Brady v. Maryland*, 373 U.S. 83 (1963), where the prosecution failed to give defense counsel a statement by a rebuttal prosecution witness, Beamus, until right before she testified. In Beamus' initial statement to police she corroborated Crayton's story. She changed her story during her testimony. Because her statement, while nonexculpatory, could be used to impeach her testimony, it falls within the *Brady* rule. *U.S. v. Bagley*, 473 U.S. 667, 676 (1985). Nevertheless there was no *Brady* violation because Crayton was given the impeachment material in time for use at trial. *U.S. v. Presser*, 844 F.2d 1275, 1283 (6th Cir. 1988). When given the 1-page statement immediately prior to Beamus' testimony, the defense could have asked for a recess but failed to do so. Furthermore defense counsel questioned Beamus about her prior inconsistent statement extensively during cross-examination.

U.S. v. Lucas
357 F.3d 599 (6th Cir. 2/12/04)

Ms. Lucas was convicted of knowingly and intentionally possessing with intent to distribute 500 grams or more of a mixture containing cocaine. The facts of this case are quite dramatic. In May, 2001, Lucas, a California resident in her mid-30's, was on vacation with 2 friends, Angelina Watts and Kimberly Quinney, on their way to visit another friend, Jackie Parker, who lived in Memphis and to attend the "Memphis in May" festival. The women flew from California to the Nashville airport where they rented a car. Lucas claimed at trial that she thought Knoxville was only minutes away from Nashville so, when the women stopped at a Residence Inn a few miles from the airport, she thought they were in Knoxville. The next morning they were unable to contact Parker so Lucas called Morrell Presley, a man she had met twice before through a friend, and asked for directions to Memphis.

Presley came to the Residence Inn and watched a movie with the group. Eventually they decided they were hungry, and Presley volunteered to go for food and was given a grocery list. Presley said he was low on gas so Watts gave him the keys to the rental car. Presley returned 5 hours later, with food but without the items on the grocery list. Lucas testified that she became frustrated so she took the rental car and started driving towards Memphis.

At the hotel Presley became upset. He told the other women to call Lucas and tell her to come back because his cell phone was in the car. Lucas was pulled over by police for speeding, and it was discovered that she was driving on a suspended license so she was arrested. In her coat police found $2,855, mostly in $20's. Police subsequently recovered 2.2 kilograms of cocaine under the front driver's seat. 3 cell phones were recovered (2 from California and 1 from Nashville, all in women's names), as well as 13 credit cards, eleven in Lucas' name and 2 in the name of Lucas' niece Robyn McPherson. A Visa Gold card application in McPherson's name was also found.

At trial the defense theory of the case was that Presley put the drugs in the car. It was brought out at trial Lucas had been convicted of bank fraud conspiracy in 1994 involving $7000 worth of travelers' checks and use of false identification. She served a 30-month sentence during which time prison guards repeatedly raped her. She received a $500,000 settlement as a result of the sexual assaults.

Evidence offered by defense that absent 3rd party had cocaine convictions is "reverse 404(b)" evidence. Lucas' first argues that the district court erred when it barred the defense from presenting evidence of Presley's prior convic-

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tion for possession and distribution of cocaine. Lucas says this not only violated the Federal Rules of Evidence but also her right to present a defense. The 6th Circuit disagrees. It first notes that this type of evidence is "reverse 404(b) evidence," in which evidence of a prior act by another is offered as exculpatory evidence by the defendant against a 3rd party, instead of being used by the prosecutor against the defendant.

Standard 404(b) analysis applies to "reverse 404(b) evidence." "Prior bad acts are generally not considered proof of *any* person's likelihood to commit bad acts in the future. . . such evidence should demonstrate something more than propensity." Standard 404(b) analysis applies where a party wants to introduce prior bad act evidence of an absent 3rd party. In the instant case Lucas "wanted the jury to make the inferential leap that because Presley sold drugs before, he is likely to have done so again." This only shows propensity to commit a crime and does not fall within any of the recognized 404(b) exceptions. Even if it was offered to prove an exception, the trial court did not err in determining probative value was outweighed by prejudicial effect. Finally Lucas' right to present a defense was not violated as the right to "a complete defense does not imply a right to offer evidence that is otherwise inadmissible under the standard rules of evidence." *Rockwell v. Yukins*, 341 F.3d 507, 512 (6th Cir. 2003)(*en banc*). Lucas was still able to present her theory that Presley put the drugs in the car through the testimony of Quinney and Watts, both who told the jury that Presley had access to the car and acted strangely when he realized Lucas had left in the car.

Evidence of prior sexual abuse of defendant by prison guards inadmissible to explain her nervousness upon arrest. Lucas next alleges that the trial court erred when it ruled that she could not present evidence about the sexual assaults she had previously experienced in prison to explain why she acted nervous on arrest. The 6th Circuit notes that the evidence was relevant "as it suggests that her behavior, which might otherwise be taken as evidence of guilt and was argued as such by the prosecution, was potentially explainable for other reasons." Furthermore any potential prejudice to the prosecution could have been lessened by a limiting instruction. Nevertheless exclusion of the evidence was harmless error because "Lucas's nervousness upon being faced by the police was not crucial to the prosecution's case" as the cocaine was found in the car she was driving; she had a lot of cash; and her testimony at trial differed from what she told the police upon her arrest.

***Batson* challenge fails where government rationale is not "inherently discriminating."** Lucas' final argument involves a *Batson* challenge. *Batson v. Kentucky*, 476 U.S. 79 (1986). The jury venire included 2 African-Americans, and the prosecutor used a peremptory challenge to exclude 1 of them, Ms. Green. When Lucas objected to the challenge, the prosecutor explained she had given the "impression that ... she just didn't want to be [there]," and "had indicated that she had been divorced before [—] we knew that might be a factor." The district court found that the Government had articulated a legitimate nondiscriminatory reason for the challenge and permitted Ms. Green's removal. Lucas' *Batson* challenge fails because the prosecution's reasoning was not "inherently discriminating." *U.S. v. Yang*, 281 F.3d 534, 548-49 (6th Cir. 2002), *cert. denied*, 123 S.Ct. 1015 (2003). "It is. . . difficult to conclude in this case that the district court made a clear error in determining that the prosecutor's peremptory challenge was free of race bias, since there is no other evidence of discriminatory bias and the prosecutor did not exercise a peremptory challenge in order to eliminate the other one of two black persons from the jury. *U.S. v. Sangineto-Miranda*, 859 F.2d 1501, 1520-21 (6th Cir. 1988)(holding that the final makeup of the jury is relevant to a finding of discrimination)."

Judge Rosen concurrence: standard 404(b) analysis should not apply to "reverse 404(b)" evidence. Judge Rosen believes the 6th Circuit should adopt the 3rd Circuit's "reverse 404(b)" analysis. *U.S. v. Stevens*, 935 F.3d 1380 (3rd Cir. 1991). Rule 404(b) is designed to protect a party to the litigation, particularly a criminal defendant, from prejudice as a result of evidence of bad character and/or the propensity to commit a crime. Rosen advocates Rule 401 analysis initially apply and then, if the evidence passes relevancy muster, Rule 403 analysis. In the instant case Rosen, applying his advocated analysis, believes the evidence should have been admitted at trial. Nevertheless he concurs with the result reached by the majority since an abuse of discretion standard applies.

Walker v. Smith
2004 WL 256986 (6th Cir. 2/13/04)

State court titling of motion not determinative of whether defense motion is a "properly filed" post-conviction motion. In this *pro se* case, the Court of Appeals holds that although the state court changed the title of prisoner's 1995 motion to a "motion for relief from judgment," its 2003 order actually decided a motion to correct his sentence. Thus, he properly filed a motion for post-conviction relief for purposes of tolling under 28 U.S.C. § 2244(d)(2).

In 1995 Walker filed a motion in Michigan state court for post-conviction relief to correct his sentence. For some reason, the motion never appeared on the state court's docket sheets. This, according to the Court is irrelevant, because "the record demonstrates that Walker did properly file a motion for post-conviction relief in 1995, because the state court decided the merits of that motion on March 28, 2003."

It is also irrelevant that the March 28, 2003, order indicated it addressed the merits of a "motion for relief for judgment" rather than a motion to correct Walker's sentence. It is clear from the prosecution's response in state court to the motion that it was responding to a motion to correct a sentence. The March 28, 2003, order actually decided Walker's motion to correct his sentence. This is a motion for post-conviction relief under the AEDPA, and it was a properly filed motion.

It is important to note that in so deciding the Court declines to consider the implication of a "motion to withdraw the motion to correct sentence" filed by Mr. Walker in the state court because he was representing himself *pro se*, and the motion in issue actually seems to be requesting the state court to take notice of its mistake in titling the prior motion.

U.S. v. Meyer
2004 WL 323184 (6th Cir. 2/23/04)

In-court identification of defendant where pretrial procedures were impermissibly suggestive. In February, 1997, Shaw, a postal employee, was unloading his vehicle at the post office when a man approached him at gunpoint and demanded his cash box. As Shaw ran away, the man fired a single gunshot. Fortuitously Shaw was unharmed. Approximately 3 months later, in May, 1997, Shaw was shown a photo lineup consisting of 6 photographs. Shaw did not identify anyone as the perpetrator. Meyer was not yet a suspect, and his photo was not included in the lineup.

3 years later, in June, 2000, Shaw was shown a second photo lineup which included a June 2000 photograph of Meyer as one of the 6 photos (the other 5 photos had also been included in the May, 1997, lineup). Shaw again did not identify anyone as the perpetrator. Barrett, the postal inspector investigating the case, immediately showed Shaw a photograph of Meyer from 1997, and Shaw identified him as the robber.

In August, 2000, Shaw was shown a third lineup consisting of the 5 photos from the 2 previous lineups and the 1997 photograph of Meyer that Shaw had been shown individually after the June, 2000, lineup. Shaw again identified Meyer as the robber. Meyer was subsequently indicted for robbery of a postal employee and use of a firearm during a crime of violence.

Prior to trial, the district court suppressed all pretrial identifications as impermissibly suggestive, but held that an in-court identification was impermissible as the court would devise a procedure to minimize the taint of the pretrial identifications. The procedure used was that prior to Shaw's testimony, the court staged a lineup which included 7 seven men of similar age and appearance outside the presence of the jury. Shaw identified Meyer, and, in his testimony, identified Meyer as the robber. Meyer objected to the identification during the lineup and Shaw's testimony. Meyer was subsequently convicted of both counts.

A conviction based on identification testimony violates a defendant's right to due process if the procedure is "so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification." *Simmons v. U.S.*, 390 U.S. 377, 384 (1968). The 6th Circuit utilizes a 2-step analysis for determining the admissibility of identification evidence. *Ledbetter v. Edwards*, 35 F.3d 1062, 1071-1072 (6th Cir. 1994). First, the defendant bears the burden of proving the identification procedure was impermissibly suggestive. Second, if the defendant meets this burden, the court evaluates the totality of the circumstances to determine whether the identification was nevertheless reliable. The following factors should be considered in the reliability analysis: (1) witness' opportunity to view the criminal at the time of the crime; (2) the witness's degree of attention at the time of the crime; (3) the accuracy of the witness's prior description of the defendant; (4) the witness's level of certainty when identifying the defendant at the confrontation; and (5) the length of time between the crime and the confrontation. *Ledbetter* at 1071, applying the factors elucidated in *Neil v. Biggers*, 409 U.S. 188, 199-200 (1972).

In-court identification not impermissibly suggestive. The Court first holds the in-court identification procedure was not unduly suggestive and was not tainted by Barrett's earlier suggestive display of the photograph. ". . .[T]he facts indicate that Shaw's in-court identification of Meyer stemmed from his recollection of the incident rather than any recollection of the photograph shown to him by Inspector Barrett. Approximately a year and a half elapsed between the last photo lineup and Shaw's in-court identification of Meyer. Meyer's appearance at the time of the in-court lineup differed noticeably from his appearance in the photograph, and the in-court lineup was comprised of Meyer and seven men of similar age and appearance."

In-court identification independently reliable. Furthermore even if the procedure was impermissibly suggestive, the identification was independently reliable. The incident lasted between 2 and 4 minutes, and Shaw had the opportunity to observe the perpetrator at close range. Contrary to Meyer's argument, Shaw's concern for his safety would heighten his degree of attention "as Shaw watched the perpetrator for an opportunity to escape." Shaw also identified Meyer quickly and confidently in the in-court lineup. The Court acknowledges the 3rd and 5th *Biggers* factors cut in Meyer's favor. There were some discrepancies between Shaw's initial description and Meyer's appearance, and the in-court identification was made 5 years after the crime. Nevertheless "given the weight of the other factors, the district court properly concluded that, under the totality of the circumstances, Shaw's identification was independently reliable."

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Judge Cole dissent. Judge Cole believes the in-court identification procedure was impermissibly suggestive and, under the totality of the circumstances, the identification was not independently reliable. First he argues that given the fact that the pretrial identification procedures were impermissibly suggestive, there is no logical reason to conclude the in-court identification was not tainted. "While a year and a half had in fact elapsed from the last photo lineup to the in-court identification, over *five years* had elapsed since the commission of the crime. It seems logical to conclude that, while the taint of the suggestive photo lineups had dissipated with time, Shaw's ability to recognize the robber from the day of the crime itself had dissipated to an even greater degree. Indeed, it might more likely be presumed that, because of the lengthy amount of time that had elapsed between the offense itself and the in-court identification, Shaw was all the more likely to have lost his recollection of the event itself, and therefore replaced his memory of the perpetrator's appearance with images from the more recently viewed photographs." Furthermore, Judge Cole notes the fact that Meyer's appearance in court was different from his appearance in his prior photo and the in-court lineup included men of similar appearance is not reassuring. "The fact that Shaw was able to pick out the very gentleman improperly shown to him from photographs does nothing to demonstrate that the taint from these photographs was no longer present. Moreover, if Meyer's appearance indeed differed substantially from his appearance in the photograph, it is safe to assume that his appearance also differed at least as substantially from his appearance at the time of the crime." Finally, the identification was not independently reliable because the 3rd and 5th factors weigh so strongly against reliability. Shaw's description of the assailant was in sharp contrast to Meyer's actual appearance in 1997, and there was a 5-year lapse between the crime and identification.

Fullmer v. Michigan Department of State Police et al.
2004 WL 344148 (6th Cir. 2/25/04)

Michigan sex offender registry does not violate procedural due process where website states all sex offenders are registered. Relying on the recent Supreme Court opinion of *Connecticut Department of Public Safety v. Doe*, 538 U.S. 1 (2003), the Court holds the Michigan Public Sex Offender Registry does not constitute an unconstitutional denial of procedural due process. Fullmer argued his due process rights were violated by the requirement that he register as a sex offender without providing him a hearing or conducting an assessment of his dangerousness or threat to the community.

In *Connecticut Dept. of Pub. Safety v. Doe*, *supra*, the Supreme Court distinguished between 2 types of registries, a registry like the Connecticut one which is based on the fact of conviction versus one based on future dangerousness. Because the basis of the registration requirement is the fact of conviction alone, dangerousness and the opportunity to be heard on the issue of dangerousness are simply not at issue. *Id.* at 7-8. In reaching this conclusion, the Court noted the following disclaimer on the registry's website makes clear that no determination of registrants' dangerousness has been made, explaining that "[i]ndividuals included within the registry are included *solely* by virtue of their conviction record and state law." *Id.* at 7 (emphasis in original).

Because Michigan's registry is based solely upon the fact of conviction, and the web site does not indicate any future dangerousness assessment has been made, it is constitutional. In so holding the Court finds it is irrelevant that language in the Michigan statute governing the registry implies an assessment of future dangerousness has been conducted. "Regardless of the language in the statute, the information on the registry's website makes it clear to anyone accessing the registry that all sex offenders convicted after a certain date are listed, without exception. Moreover, there is nothing on the website to indicate that the state has made an individual determination as to a registrant's dangerousness."

Substantive due process challenge is not foreclosed by this decision. The decision in this case does not foreclose a challenge to the registry as a violation of substantive due process rights of a registrant. Because this was not relied upon by Fullmer, it is not at issue in the instant case. "As the Court indicated in *Connecticut Department of Public Safety v. Doe*, the state 'has decided that the registry information of *all* sex offenders – currently dangerous or not – must be publicly disclosed' and that 'states are not barred by principles of '*procedural* due process from drawing such classifications.'" *quoting Conn. Dep't of Pub. Safety v. Doe*, 538 U.S. at 11 (emphasis in original). ■

Emily Holt
Assistant Public Advocate

Education is the movement from darkness to light.

-Allan Bloom

PLAIN VIEW . . .

Ernie Lewis, Public Advocate

Groh v. Ramirez
124 S.Ct. 1284 (2004)

There are two questions addressed by the Court in this case: "(1) whether the search violated the Fourth Amendment, and (2) if so, whether petitioner nevertheless is entitled to qualified immunity, given that a Magistrate Judge…relying on an affidavit that particularly described the items in question, found probable cause to conduct the search."

The case arose in a large ranch in Montana. An informant told an ATF Agent that he had seen a large stockpile of weapons at the ranch. An application for a search warrant was made, with sufficient evidence in the affidavit to establish probable cause. The application detailed the place to be searched and identified items to be seized. However, the warrant itself only described the house as the place to be searched, and did not further detail what should be seized. Further, the warrant did not incorporate the affidavit by reference. When the warrant was executed, nothing was found. No charges resulted. However, Joseph Ramirez and his family filed a civil suit under *Bivens v. Six Unknown Fed. Narcotics Agents*, 403 U.S. 388 (1971) and #42 U.S.C. #1983, alleging a violation of their Fourth Amendment rights. The district court entered a summary judgment for the ATF Agents, holding that there had not been a violation of the Fourth Amendment, and even if there had been, the respondents were entitled to qualified immunity. The Ninth Circuit reversed, holding that the warrant was invalid because it failed to particularly describe the place to be searched and the things to be seized. The Court also held that all of the officers were entitled to qualified immunity except for the single ATF Agent who had been the leader of the search. The United States Supreme Court granted *certiorari*, and found for the respondents.

The 5-4 decision is written by Justice Stevens, joined by Justices Souter, Ginsburg, Breyer, and O'Connor. The Court held that the warrant was invalid because it failed to state with particularity the place to be searched or the things to be seized. The particularity must be shown in the warrant and not just in the application. The Court noted that cross-referencing the affidavit in the warrant could have saved the warrant, but that was not done in this case.

Significantly, the Court rejected the petitioner's argument that the search in this case was "reasonable" despite the lack of particularity in the warrant. The Court stated that because there was no particularity whatsoever in the warrant, that this was different than a case in which there was a wrong address or a typographical error. "'We are not dealing with formalities.'… Because '"'the right of a man to retreat into his own home and there be free from unreasonable governmental intrusion"' stands '"[at the very core" of the Fourth Amendment,' …our cases have firmly established the '"basic principle of Fourth Amendment law" that searches and seizures inside a home without a warrant are presumptively unreasonable…'"

The Court reiterated that a warrant that fails only in the particularity requirement is presumptively invalid, citing *Massachusetts v. Sheppard*, 468 U.S. 981 (1984). The Court rejected the argument that if the goals of particularity are met by oral statements and the search is limited to the items in the affidavit, then the search is reasonable. "But unless the particular items described in the affidavit are also set forth in the warrant itself (or at least incorporated by reference, and the affidavit present at the search), there can be no written assurance that the Magistrate actually found probable cause to search for, and to seize, every item mentioned in the affidavit."

The Court also broadly stated two goals of the particularity requirement. First, requiring the warrant to state with particularity the place to be searched and the things to be seized prevents the general search. Second, it "'assures the individual whose property is searched or seized of the lawful authority of the executing officer, his need to search, and the limits of his power to search.'"

The Court further held that the ATF lead investigator was not entitled to qualified immunity. "Given that the particularity requirement is set forth in the text of the Constitution, no reasonable officer could believe that a warrant that plainly did not comply with that requirement was valid."

Justice Kennedy dissented, joined by Justice Rehnquist. He agreed that the Fourth Amendment had been violated by the warrant. However, he believed the ATF Agent should have received qualified immunity. In Justice Kennedy's view, the case involved a mistake of fact, with the officer making a clerical error. "The question is whether the officer's mistaken belief that the warrant contained the proper language was a reasonable belief. In my view, it was…An officer who complies fully with all of these duties can be excused for not being aware that he had made a clerical error in the course of filling out the proposed warrant."

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Justice Thomas also wrote a dissenting opinion, joined fully by Justice Scalia, and in part by Justice Rehnquist. For Justice Thomas and Justice Scalia, the most important thing to consider about a search is whether it is reasonable or not. And for them, the key question is "whether it is always appropriate to treat a search made pursuant to a warrant that fails to describe particularly the things to be seized as presumptively unreasonable." Under the circumstances of this case, the two dissenters would find the search constitutional because it was reasonable, despite the fact that the warrant did not meet the particularity requirement.

Justice Rehnquist joined Justices Thomas and Scalia in arguing that the ATF Agent was entitled to qualified immunity here. "Even if it were true that no reasonable officer could believe that a search of a home pursuant to a warrant that fails the particularity requirement is lawful absent exigent circumstances—a proposition apparently established by dicta buried in a footnote in *Sheppard*—petitioner did not know when he carried out the search that the search warrant was invalid—let alone legally nonexistent. Petitioner's entitlement to qualified immunity, then, turns on whether his belief that the search warrant was valid was objectively reasonable. Petitioner's belief surely was reasonable."

United States v. Flores-Montano
2004 WL 609791, 2004 U.S. LEXIS 2548 (U.S. 2004)

Flores-Montano was driving a 1987 Ford Taurus station wagon when he tried to enter California at the Otay Mesa Port of Entry. A customs inspector seized the Taurus, and it was sent to another inspection station. After tapping on the gas tank and hearing a "solid" sound, the officer took off the gas tank and inspected it, revealing 37 kilograms of marijuana. A motion to suppress was granted at the trial court. The 9th Circuit affirmed, holding that reasonable suspicion was required to remove a gas tank at a border search.

In a unanimous opinion written by the Chief Justice, the Supreme Court overruled the 9th Circuit. The Court held that removing a gas tank at a border search requires no level of suspicion. In so doing, the Court distinguished this case from that of *United States v. Montoya de Hernandez*, 473 U.S. 531 (1985), in which the Court had stated that "[r]outine searches of the persons and effects of entrants are not subject to any requirement of reasonable suspicion, probable cause, or warrant." The Court noted that "the reasons that might support a requirement of some level of suspicion in the case of highly intrusive searches of the person—dignity and privacy interests of the person being searched—simply do not carry over to vehicles."

It is essential to recognize that this case is all about searches at the international borders in a post-9/11 world. "The Government's interest in preventing the entry of unwanted persons and effects is at its zenith at the international border." The Court rejected Flores-Montano's position that he had a privacy interest in his gas tank. "[T]he expectation of privacy is less at the border than it is in the interior…We have long recognized that automobiles seeking entry into this country may be searched." The Court also rejected his argument that by disassembling the gas tank, a property interest had been damaged, noting that there was no evidence that disassembling the gas tanks had caused any property damage.

The Court also relied upon data showing the nature of the problem with gas tanks. 25% of drug seizures at southern California ports of entry involved smuggling through gas tanks.

Commonwealth v. Rainey
2004 WL 259235, 2004 Ky. App. LEXIS 33 Ky.App., 2004

Two Louisville police officers saw Rainey driving at a high rate of speed, park, get out of his car, and start shouting at residents nearby. When the officers reach Rainey, he was 50 feet from his car. The officers arrested him for DUI after observing him. They searched his car and found a handgun underneath the driver's seat. Rainey was then charged with possession of a firearm by a convicted felon and being a PFO in the 1st degree. Rainey filed a motion to suppress the handgun, and the circuit judge granted the motion. The Commonwealth filed an interlocutory appeal.

The Court of Appeals affirmed the decision of the trial court in an opinion by Judge Taylor, joined by Judges Minton and Schroder. The core of their opinion is that where the defendant is not in the car at the time of the arrest, the search of the car was not justified by the search incident to a lawful arrest exception under *Chimel v. California*, 395 U.S. 752 (1969), and *New York v. Belton*, 453 U.S. 454 (1981). The Court emphasized that "Rainey was not an occupant of the vehicle when the officers first encountered him." The Court relied upon *United States v. Strahan*, 984 F.2d 155 (6th Cir. 1993), where the Court had stated that because "Strahan was approximately thirty feet from his vehicle when arrested, *White* and *Belton* are inapplicable. The police did not make an arrest of an occupant of a vehicle. Accordingly, the *Chimel* test governs. Because the passenger compartment of the vehicle was not within Strahan's 'immediate control' at the time of the arrest, the search was not incident to a lawful arrest, and suppression is proper.'"

The Court also rejected the Commonwealth's contention that the search was justified under the probable cause automobile exception to the warrant requirement. "In this case, the uncontroverted facts reveal that the officers did not observe Rainey consuming alcohol while operating his vehicle nor did they possess any information tending to show Rainey had done so. On the contrary, Rainey told the officers he had been thrown out of a bar, which would lead to the logical conclusion he had been drinking at the bar rather than in his

vehicle. Upon the totality of the circumstances, we cannot conclude there exists a fair probability that open containers of alcohol or other intoxicants would be found in Rainey's vehicle. Hence, we hold the officers did not possess probable cause to search Rainey's vehicle as required under the automobile exception."

Gray v. Commonwealth
2004 WL 405767, 2004 Ky. App. LEXIS 53 Ky.App., 2004

The police were watching an abandoned house when Gray pulled his car onto the yard. The police came up to Gray and talked with him. Sharrard Kendrick approached Gray and told the police that Gray was there to bring him food. The police checked Gray's identification, and then checked for outstanding warrants. While the warrants check was occurring, the police discovered a package of cocaine on the ground. As a result, Gray was charged with possession of cocaine and being a PFO. He entered into a conditional plea of guilty after his motion to suppress was denied. An appeal to the Court of Appeals followed.

In an opinion by Judge McAnulty, the decision of the court below was upheld. The Court held that the stop of Gray was constitutional as a *Terry* stop due to Gray's having trespassed onto the abandoned property at the time of the stop. Once Kendrick gave an explanation for Gray's presence, the police did not have to stop their investigation. Once there is a reasonable suspicion, the police may continue to investigate until they are satisfied that the person arrested is not engaging in criminal activity."[W]e conclude that the officer's warrant check was reasonably related in scope to the circumstances that justified the stop in the first place." Accordingly, the admission of the cocaine found as a result of the stop was constitutional.

The Court also reflected on the quantity of "findings" by the trial court. The Court noted that RCr 9.78 requires "findings resolving the essential issues of fact raised by the motion or objection and necessary to support the ruling." The Court concluded that "Denied…Officers were justified in investigating circumstances of D's presence at home" complied with RCr 9.78.

Hatcher v. Commonwealth
2004 WL 362244, 2004 Ky. App. LEXIS 49 Ky.App., 2004

A Paducah Police Office went to Hatcher's home in response to a complaint about a possibly abandoned minor. A 12-year-old boy answered the door, at which time the officer saw a "pipe on a table across the room from where he was standing." The pipe was ceramic, with a 2-4 inch stem, and a "large bowl with a skull on the front of it." The officer went into the house, picked up the pipe, and smelled marijuana coming from it. The officer arrested Hatcher and charged her with possession of drug paraphernalia. A motion to suppress was denied, with the trial court finding the pipe was admissible under the plain view exception to the warrant requirement. Hatcher entered a conditional guilty plea, and appealed the denial of the motion to suppress.

The Court of Appeals, in an opinion written by Judge Minton and joined by Judges Johnson and Combs, reversed the trial court. The Court held that "Carr did not have a lawful right of access to manipulate the pipe in that his entry into the house was illegal." The court found that there were no exigent circumstances justifying the officer's entry into the house to seize the pipe. Nor was it immediately apparent to the officer that the pipe was evidence of a crime as required by the plain view exception. "While it is, of course, true that a tobacco pipe can be used as drug paraphernalia, there was no evidence presented from which Carr could have had probable cause to believe this pipe was being used to smoke marijuana. He testified that the pipe had a skull on the front, but that at most makes the pipe unusual. 'T]he police are not authorized to seize odd items.'"

Commonwealth v. Erickson
2004 WL 315038, 2004 Ky. App. LEXIS 38 Ky.App., 2004

Erickson was stopped because his rear license plate was not illuminated. After checking Erickson's driver's license, proof of insurance, and the identifications of two passengers, the police warned Erickson to get his light fixed. The officer then asked Erickson if he could look inside his car. When Erickson said "sure, go ahead," (Why do they do that?), the officer discovered 10 baggies of methamphetamine. The trial court granted Erickson's motion to suppress on the basis of his having been "'unconstitutionally detained without reasonable suspicion beyond the purpose of the traffic stop.'" The Commonwealth appealed.

The Court of Appeals reversed in an opinion written by Judge Combs and joined by Judges Johnson and Minton. The Court reviewed *United States v. Mesa*, 62 F. 3d 159 (6th Cir. 1995), where the Court had stated that once "the purposes of the initial traffic stop were completed, there is no doubt that the officer could not further detain the vehicle or its occupants unless something that occurred during the traffic stop generated the necessary reasonable suspicion to justify a further detention." The Court noted in *Mesa* the Court had granted relief where the driver had been locked in a cruiser before giving consent to search. The Court further noted that *Mesa* had been significantly limited in *Ohio v. Robinette*, 519 U.S. 33 (1996), where the Court held that "a prolonged detention and request to search a detainee's car following a traffic stop was reasonable despite the absence of that extra 'something' to generate an additional basis for reasonable suspicion of other criminal activity." As a result, the Court held that the defendant had consented to the search, and that consideration of whether reasonable suspicion justified continued detention was not warranted.

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United States v. Berryhill,
352 F. 3d 315 (6th Cir. 2003)

Berryhill was invited to an apartment by a friend who was not the tenant of the apartment. Evidence seized from the apartment resulted in Berryhill's conviction. He appealed to the Sixth Circuit, complaining that the district court had been in error when it found that he did not have a reasonable expectation of privacy in the apartment. The district court's decision was affirmed in a decision by Judge Norris, joined by Judges Boggs and Clay.

First, the Court rejected Berryhill's argument that he had in fact intended to spend the night at the apartment. This fact would have been important under *Minnesota v. Olson*, 495 U.S. 91 (1990), where the court held that an overnight guest has a reasonable expectation of privacy. "Berryhill lacked any of the items one would expect an overnight guest to have with him. He carried no clothes or toothbrush; indeed, the only bag in his possession contained materials for manufacturing methamphetamines."

The Court then rejected Berryhill's assertion that a guest of someone other than the tenant has a reasonable expectation of privacy in the place to which he was invited. He relied upon a sentence from *Olson* saying "few houseguests will invite others to visit them while they are guests without consulting their hosts; but the latter, who have the authority to exclude despite the wishes of the guest, will often be accommodating." *Olson*, 495 U.S. at 99. The Court interpreted *Olson* to say "the reason a houseguest has a reasonable expectation of privacy is because he knows that the host would respect his privacy, having obtained the host's permission to be at the residence. *Olson* cannot be taken for the proposition that guests' visitors can be assured that their privacy will be respected by the lawful owners or tenants of the residence. Berryhill does not dispute that he never received permission to stay at the apartment directly from its tenant; therefore, he could not be assured that his host would respect his privacy. Berryhill's expectation of privacy was not reasonable."

United States v. Gillis
358 F.3d 386 C.A.6 (Tenn.),2004

The Knoxville Police Department was called to investigate a domestic disturbance. When they arrived, they spoke with Shaneska Williams, who told them that her boyfriend lived at a house where there was marijuana, crack cocaine, and ecstasy. She told them also that drugs were kept in a wrecked Nissan Maxima parked in the driveway. She gave her consent for the officers to search the house. She showed the officers a lease that had her name on the lease, along with Gillis' name. When the officers arrived at the boyfriend's house, they saw that he was sitting in a Caprice Classic with the engine running. When the door was opened, the officer smelled marijuana. The officer asked for consent to search the Caprice, which was declined. The officer looked on the floorboard of the car and saw a plastic bag with 11.4 grams of crack cocaine. A search of the house revealed some small quantities of drugs. A search of the wrecked Nissan Maxima revealed 60 grams of crack cocaine. Gillis was arrested and charged with possessing with intent to distribute over 50 grams of cocaine. His motion to suppress was denied. Gillis appealed to the Sixth Circuit, which affirmed the district court order.

Judge Gibbons wrote the opinion for the Court, joined by Judges Gwin and Boggs. The Court found that Williams had apparent authority to consent to the search, and thus did not reach the question of whether she had actual authority. The Court further found that Gillis did not have a reasonable expectation of privacy in the Maxima, and thus could not challenge the constitutionality of the search of the vehicle.

United States v. Forest
355 F.3d 942 (6th Cir. 2004)

The DEA had identified Forest and a co-defendant Gaines as persons trafficking in cocaine in Youngstown, Ohio. They obtained a Title III authorization to intercept their cellular phone communications. One such interception informed the DEA that there was a shipment of cocaine expected. The DEA began to watch both persons. When they lost visual contact with them, they dialed Garner's cell phone, without allowing it to ring, which resulted in "cell-site data" that allowed the DEA to locate their locations. Thereafter, both Forest and Garner were arrested and charged with violation of conspiracy to distribute more than 500 grams of cocaine. They were convicted after a trial by jury.

The Sixth Circuit, in an opinion written by Judge Gilman, affirmed the convictions. The Court ruled against the defendants' Fourth Amendment arguments, relying upon *United States v. Knotts*, 460 U.S. 276 (1983). There, the police had placed a beeper in a container of chemicals, which allowed the police to track Knott's car even when visual contact was lost. The Court in *Knott* held that there was no legitimate expectation of privacy because the beeper only allowed the police to keep track of their physical presence on public highways. The Court applied *Knotts*, finding that "[a]lthough the DEA agents were not able to maintain visual contact with Garner's car at all times, visual observation was *possible* by any member of the public. The DEA simply used the cell-site data to 'augment the sensory faculties bestowed upon them at birth,' which is permissible under *Knotts*."

United States v. Woosley
2004 WL 575111, 2004 U.S. App. LEXIS 5450,*;
2004 FED App. 0085P (6th Cir.) 2004

An informant contacted a Kentucky State Trooper and told him that Rodney Woosley was trafficking in marijuana from his business, a Quick Lube Plus. The Trooper wrote a peti-

tion for a search warrant. In the affidavit he stated that a "confidential informant whom [sic] is known to the affiant to be credible and reliable, who has provided accurate information in the past which has been shown to be truthful and reliable. This informant stated to the affiant that on [August 15, 2001] they observed approximately five pounds of processed marijuana under the desk of the Owner Rodney Woosley. Also present were two firearms which they described as Handguns possibly 9MM." The affidavit also stated that he had received tips from other informants concerning the drug trafficking at the Quick Lube Plus, and likewise heard the same thing from the local police department. A County Attorney verified that the affidavit was sufficient to support the application for a search warrant. A district judge then issued the warrant. The execution of the warrant resulted in the seizure of marijuana and two handguns. Woosley was charged in federal court. His motion to suppress was denied, after which he entered into a conditional plea.

The Sixth Circuit affirmed the lower court in an opinion written by Judge Rogers. The Court held that the district court had properly found the affidavit sufficient to establish probable cause. The Court recognized that the affidavit did not contain a basis for the lower court to assess credibility of the informant. However, the Court found there to be sufficient corroboration of the informant to constitute probable cause. "Here, Trooper Armbrust, who had received information about drug dealing from Woosley's business location in the past, received a tip from a known, credible and reliable source. The tip identified the contraband with great specificity and described its particular location with precision. Trooper Armbrust then spoke with a local law enforcement officer, who confirmed that he had received similar reports. A magistrate could conclude, based on the totality of the circumstances described in the affidavit, that there was a fair probability that contraband or evidence of a crime would be found at Woosley's business. Accordingly, the warrant issued for Woosley's business was supported by probable cause."

United States v. Carpenter
360 F.3d 591 ;2004 FED App. 0072P (6th Cir.) 2004

We have reviewed this case before. *United States v. Carpenter*, 317 F. 3d 618 (6th Cir. 2003). In this case, an affidavit for a search warrant read as follows: "On June 23, 1999 at approximately 12:30 p.m., Helicopter Pilot Lt. Bob Crumley was conducting an aerial search of Hawkins Co. when he was flying over the above described property he saw numerous Marijuana Plants growing. Near the residence. Upon information I received from Lt. Crumley, there is a road connecting the above described residence to the marijuana plants. Having personal knowledge that Lt. Crumley is certified in the identification of marijuana I feel there is probable cause to search the said residence and property and seize any illegal contraband found." A warrant was issued, and marijuana was seized. The Carpenters' motion to suppress was denied, and they were found guilty at a jury trial. An *en banc* consideration was ordered to consider the application of the good faith exception to these facts.

In this opinion written by Judge Siler, the Court holds that the "police reliance on the deficient warrant was reasonable because the information that *was* presented to the issuing judge was sufficient to support a good-faith belief in the warrant's validity." The Court acknowledged that there was no nexus between the crime and the place to be searched. However, pursuant to the good faith exception of *United States v. Leon*, 468 U.S. 897 (1984), the warrant was "not completely devoid of any nexus between the residence and the marijuana that the police observed…the affidavit was not totally lacking in facts connecting the residence to the marijuana patches. These facts…were too vague to provide a substantial basis for the determination of probable cause. But these facts…were not so vague as to be conclusory or meaningless…We therefore conclude that reasonable officers could have believed that the affidavit as submitted, even without the additional relevant information known to the officers, was sufficient to support the issuance of the warrant."

Judge Gilman concurred in the opinion of the Court. However, he disagreed with the *en banc* court's avoidance of the issue that had been briefed. "I respectfully disagree with its decision to defer to another day the issue of whether a court should consider the additional information known to the officers but not communicated to the magistrate in deciding if the *Leon* good-faith exception has been satisfied." According to Judge Gilman, "[I]nformation tending to show the existence of probable cause that was not disclosed to the issuing magistrate cannot logically have any bearing on the reasonableness of the presenting officer's belief *that the warrant was properly issued*, as opposed to the officer's reasonable belief that probable cause existed for the search. The straightforward reason for this conclusion is that no magistrate can base his or her determination of the existence of probable cause upon information never received." He concluded his concurrence stating that no "compelling authority, in sum, stands for the proposition that a search conducted pursuant to an invalid warrant can be saved under *Leon's* good-faith exception on the basis that the officers had other information that was not presented to the issuing magistrate, but that would have established probable cause. This proposition is contrary to *Leon* and, in my opinion, the court should so declare in the case before us."

Judge Moore dissented "because the officers' reliance upon the warrant was not reasonable given the exiguous information presented to the issuing judge, and thus the *Leon* good-faith exception does not apply to this case." She also agreed with Judge Gilman's concurring opinion. "Permitting information not presented to the issuing magistrate to serve as the lynchpin for invoking *Leon* perverts the meaning of the

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warrant requirement because it allows law enforcement officials to bypass the judiciary; evidence produced by inadequate search warrants, which are starved of information and seemingly doomed by insufficient probable cause, should not receive a reprieve solely because of information obscured from the issuing magistrate's consideration."

Judge Martin agreed with Judge Moore's dissent. He added that given "the sophisticated technologies that the police now have at their disposal, as well as the wide discretion that they currently enjoy, it is especially important that we are careful not to expand their powers beyond what is authorized by the Constitution. In this case, the Constitution has been set aside in the name of expediency. Regrettably, we have descended further down that slippery slope of post-hoc rationalization, where everything that the police do becomes acceptable when viewed in retrospect."

United States v. Garrido-Santana
360 F.3d 565, 2004 FED App. 0052P (6th Cir.) 2004
Decided and Filed: Feb. 20, 2004

In 1997, a Shelby County Patrolman saw a 1997 Chrysler sedan driven by Elvis Garrido-Santana on I-40 that was driving at 71 mph. He pulled over the sedan. The officer began asking questions, and became suspicious that a Puerto Rican would be driving a car with Texas plates. Garrido-Santana said that the car was a rental car. A computer check was run, and the officer began to fill out a warning citation for speeding. He noticed that Garrido-Santana was nervous, fidgeting, and avoided eye contact. The officer asked for consent to search, and Garrido-Santana agreed (Why do they do that?). Meanwhile, a drug dog arrived, but it did not alert. Two officers began to search the car, and placed Garrido-Santana into a police car. Eventually, the officers found white cellophane-covered bundles in the gas tank. Garrido-Santana was arrested and charged with possessing cocaine with the intent to distribute. He entered a conditional plea following the denial of his motion to suppress.

Judge Kennedy wrote the opinion for the Court. The defendant challenged the reason for the stop, alleging a pretextual stopping. The Court relied upon *Whren v. United States*, 517 U.S. 806 (1996) to state that the officer had probable cause to believe the defendant was speeding, and the officer's motive for the stop were irrelevant. The Court further rejected the defendant's assertion that the officer had exceeded the bounds of the initial stopping by asking about contraband. "Lomax's questioning defendant about whether he possessed any illegal contraband was not unreasonable under the Fourth Amendment.

The Court also rejected the defendant's position that the search of the gas tank exceeded the scope of the defendant's consent. "It was objectively reasonable for Lomax and Lane to have concluded that this general consent to search the vehicle included consent to search any container within that vehicle that might have held illegal contraband" including consent to search the vehicle's gas tank. "The Fourth Amendment did not require either officer to obtain separate permission to search the gas tank."

SHORT VIEW . . .

1. ***State v. Martinez*, Kan.,** 78 P.3d 769 (Kan. 2003). Mandatory collection of inmates' DNA does not violate the Fourth Amendment according to the Kansas Supreme Court. The Court recognized the "special needs" exception to the warrant requirement. It should be remembered that *United States v. Kincade*, 345 F. 3d 1095 (9th Cir. 2003) held that seizing inmates' blood for purposes of creating a DNA database did not meet the requirements of the special needs doctrine, and violated the Fourth Amendment. The 9th Circuit has agreed to rehear *Kincade en banc*. *United States v. Kimler*, 335 F 3d. 1132 (10th Cir. 2003) has reached the opposite conclusion. *In re D.C. C.*, 2001 WL 1387419, 2001 Mich. App. LEXIS 2345 (Mich. Ct. App. 2001) has held that requiring juveniles who must register as sex offenders to also provide a DNA sample in order to receive probation is a practice consistent with the Fourth Amendment under the special needs exception.

2. ***United States v. Manjarrez***, 2004 WL 238031, 2004 U.S. LEXIS 1982 (Mem) U.S.,2004 (U.S. 2004). [note: the preceding is the cite to the *cert*. denied mem. Opinion – the cite to the 10th circuit's opinion is 348 F.3d 881 (10th Cir 2003)] The Tenth Circuit has held constitutional the "consensual frisk" conducted after a motorist has given consent to search his car. The Maryland Court of Appeals reached the opposite conclusion in *Graham v. State*, 807 A. 2d 75 (2002).

3. ***Commonwealth v. Brinson***, 800 N.E.2d 1032 (Mass. 2003). The police may not search the car of an arrestee where he has parked his car in a business parking lot and driven off in another car to the place where he was arrested. The Court rejected the state's position that the search was justified under the inventory exception as well as the community caretaking exception.

4. ***Petersen v. Mesa*,** 83 P.3d 35 (Ariz. 2004). Random drug testing of firefighters by the city of Mesa, Arizona, is a violation of the Fourth Amendment, and does not qualify as a "special needs" search absent a showing of a drug problem among firefighters. ■

Ernie Lewis
Public Advocate

CAPITAL CASE REVIEW

U. S. SUPREME COURT

***Banks v. Dretke*, 124 S.Ct. 1256 (2004)**
(decided February 24, 2004)

Majority: Ginsburg (writing), with Rehnquist, C.J., and Stevens, O'Connor, Kennedy, Souter, and Breyer. Scalia and Thomas joining as to Part III.

Thomas concurring in part, dissenting in part (with Scalia).

A *Brady* Victory
In this pre-AEDPA[1] case, the U. S. Supreme Court holds that petitioner Banks was entitled 1) to present evidence in support of one *Brady*[2] claim that had not been presented in state post conviction, and was also entitled 2) to a certificate of appealability (COA) on the question whether he adequately raised a second *Brady* claim.

"Open File" Discovery
The prosecutor maintained throughout the proceedings that it provided "open" discovery of everything in its files. However, one witness, Farr, was a paid informant, and another witness, Cook, had been intensively coached by the prosecutor and law enforcement officers. When Farr testified under oath that he never gave the police a statement, and did not talk to the police until a few days before trial, the prosecutor stood mum. The prosecutor allowed Cook to testify three times on cross-examination that he had not talked to anyone about his testimony. Later, the prosecutor argued Farr's honesty to the jury.

The truth was kept secret through Banks' direct appeal, and through state post conviction.

First, The Affidavits
Finally, three years after Banks filed his federal habeas, Farr and Cook finally admitted their dealings with the prosecution, and provided affidavits, which Banks attached to a motion for discovery and hearing. In the affidavits, witness Farr admitted that he had agreed to help Detective Huff arrest Banks out of fear of arrest on drug charges, and was paid $200. And witness Cook stated that he had participated in pre-trial practice sessions at which prosecutors told him he must either testify as they wanted or spend the rest of his life in prison.

Then the Discovery, Evidentiary Hearing, And Habeas Relief
The Magistrate Judge then ordered discovery, and a hearing. Only then did the State of Texas cough up a transcript of a 1980 pre-trial interrogation of Cook by police and prosecutors. After an evidentiary hearing, the district court granted Banks' habeas petition with respect to his death sentence.

Federal Rule of Civil Procedure 15(b)
However, the federal district court refused to grant a new guilt-phase trial, reasoning that Banks had not properly pled a *Brady* claim as to the witness Cook. The court rejected Banks' argument that the Cook transcript claim should be treated as if raised in the pleadings under Federal Rule of Civil Procedure 15(b).

The Fifth Circuit overturned the relief granted by the district court, ruling Banks had not acted diligently, the affidavits were procedurally barred, and Farr's status as an informant was not "material" for *Brady* purposes. (*i.e.*, its suppression did not give rise to sufficient prejudice to overcome a procedural default.) *Kyles v. Whitley*, 514 U.S. 419 (1995).[3] Like the district court, the Fifth Circuit also rejected Banks's argument that his Cook Brady claim had been aired by implied consent under Rule 15(b), and denied a certificate of appealability.

Held: Here the U. S. Supreme Court overturns the Fifth Circuit, and holds that Banks's Farr *Brady* claim, as it relates to his death sentence, meets all three elements of *Brady*. First, it was favorable to the accused, as exculpatory or impeaching. Second, the state suppressed the evidence. And third, the evidence was "material" in that prejudice ensued. By meeting the second and third *Brady* elements, Banks also satisfied cause and prejudice. That is, he demonstrated "cause" for his failure to present the evidence in state court, and "prejudice" as a result. This is required for a case arising prior to the AEDPA. *Keeney v. Tamayo Reyes*, 504 U.S. 1 (1992).

In contrast to *Strickler v. Greene*, 527 U.S. 263 (1999) (where the Court found cause but no prejudice) here there was prejudice because the prosecution made Farr the centerpiece of its case, and argued his credibility in closing. Since there was an "open file" policy, Banks could not be faulted for relying on "open file" discovery and failing to make a formal *Brady* motion in state court.

The Court also finds Banks's case stronger than *Strickler* on the "cause" issue. In *Banks*, during both the guilt and penalty phases of Banks's trial, Farr repeatedly misrepresented his dealings with the police, and the prosecutor allowed his testimony to stand uncorrected, in violation of

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Giglio v. United States, 405 U.S. 150 (1972). However, having decided the *Brady* issue, the Court saves for another day the question whether a *Giglio* claim, to warrant adjudication, would have to be separately pleaded. Nor did the jury benefit from "customary, truth-promoting precautions that generally accompany the testimony of informants."

Certificate of Appealability/Federal Rule of Civil Procedure 15(b)

Banks contended that evidence substantiating the Cook *Brady* claim had been aired before the Magistrate Judge, and therefore, the claim should have been treated as if raised in the pleadings, under Federal Rule of Civil Procedure 15(b). The Fifth Circuit "appears" to have viewed Rule 15(b) as inapplicable. However the State of Texas conceded at oral argument before the U.S. Supreme Court that the issue is one that "jurists of reason would find…debatable."

The Court holds that a COA should have issued, citing its prior precedents of *Harris v. Nelson*, 394 U.S. 286, 294, n. 5 (1969) and *Withrow v. Williams*, 507 U.S. 680, 696, and n. 7 (1993). The Court points out that the issue of the undisclosed Cook interrogation transcript was indeed aired and the transcript itself was admitted into evidence without objection. Thus the Court provides strong hints to the Fifth Circuit as to how the case should be treated on remand.

Justices Thomas and Scalia join in the COA decision, but dissent regarding the Farr *Brady* claim. The dissent discusses Thomas's reasons for feeling that the nondisclosure of Farr's informant status did not prejudice Banks.

SIXTH CIRCUIT COURT OF APPEALS

***Cone v. Bell*, 2004 WL 370265 (6th Cir. 2004) (decided March 1, 2004) ("*Cone II*") THIS OPINION IS NOT FINAL**

Majority: Ryan (writing)
Concurring: Merritt
Dissent: Norris

"Heinous Atrocious or Cruel" Aggravator is Unconstitutionally Vague

This Tennessee case (involving a double murder of an elderly couple) was reversed and remanded by the 6th Circuit back in 2001 due to ineffective assistance of counsel at sentencing. *Cone v. Bell*, 243 F.3d 961 (6th Cir. 2001). It was quickly reversed by the U. S. Supreme Court, which remanded for further proceedings. *Bell v. Cone*, 535 U.S. 685 (2002). This decision –"*Cone II*"— is the result of the further proceedings. Here, the 6th Circuit has granted Cone relief a second time, ruling again that Cone gets a new sentencing trial, this time because Tennessee's "heinous, cruel, or unusual" aggravator (HAC) is unconstitutionally vague, an issue not reached earlier. Here, the 6th Circuit relies on *Godfrey v. Georgia*, 446 U.S. 420 (1980) as clearly established Supreme Court law supporting a vagueness challenge to any aggravating circumstance.

Jury's Reliance on Two Invalid Aggravators Was Not Harmless Error

Cone's jury found four aggravators, 1) previous conviction of a felony with the threat or use of violence; 2) knowingly risking two or more lives other than the murdered victims; 3) HAC; and 4) murder for the purpose of avoiding arrest. In addition to invalidating the HAC aggravator, the 6th Circuit also threw out the "great risk of death to others" aggravator, based on insufficient evidence. The jury's reliance on *two* invalid aggravators was not harmless error.

Decision Opens Door for Previously Unraised Claims in Federal Habeas

Kentucky doesn't have an atrocious, heinous or cruel aggravator. But *Cone II* is still important for Kentucky's capital post conviction attorneys because of the Court's ruling on important procedural issues. In order to grant Cone relief, the 6th Circuit has now opened the federal habeas door to 8th Amendment claims that were not explicitly raised at trial, on appeal, or in state post conviction. Cone had not explicitly raised his 8A vagueness challenge at trial or on appeal. In fact, under the 6th Circuit's decision, he didn't need to raise it explicitly until his federal habeas petition.

Raise in Post Conviction All Issues Arguably Determined in KRS 532.075 Review

Cone raised his 8A claim in a second state post conviction action. The trial court dismissed it, the Tennessee Court of Criminal Appeals upheld the dismissal on the grounds the 8A issue had either been waived or previously determined, and Tennessee's high court refused to hear an appeal.[4] The 6th Circuit ruled —based on Tennessee law— that even though Cone had not expressly raised the issue, Tennessee's high court had implicitly reviewed and *determined* as part of Cone's direct appeal all 8A issues, including Cone's vagueness challenge. This had occurred as part of the Tennessee Supreme Court's mandatory review to determine whether Cone's sentence of death was imposed in any arbitrary fashion.[5] As a determined issue, Cone's vagueness challenge was properly exhausted and an appropriate issue for federal habeas review.

After *Cone II*, Kentucky capital post conviction counsel preparing federal habeas petitions should read KRS 532.075(3) and be creative in raising all possible issues that arguably have been determined as part of the Kentucky Supreme Court's mandatory review.

Cause and Prejudice
Merritt's concurrence recognizes that even if the HAC claim had been procedurally defaulted, the claim was nonetheless exhausted because it was raised as an ineffective assistance of counsel (IAC) claim in post-conviction and exhausted by that route. According to Merritt, the IAC of both trial and appellate counsel in failing to raise the HAC issue constituted sufficient "cause" for the federal court to overlook their failure to raise and exhaust the claim. This should alert post conviction counsel who raise substantive claims in post-conviction to also raise related IAC of trial and appellate counsel, in order to provide "cause" for overlooking any procedural default.

KENTUCKY SUPREME COURT

***Garland v. Commonwealth*, 2003 WL 22429532**
(As Modified on denial of rehearing on 2-19-2004)
THIS OPINION IS NOT FINAL

Justice Lambert (Writing)
Justice Keller (Dissenting, joined by Cooper and Stumbo)
Justice Stumbo (Dissenting separately)

Court Rejects all 39 Claims Raised by Garland
John Garland raised 39 claims in the direct appeal of his death sentence, the vast majority of which are unpreserved. The Kentucky Supreme Court here denies relief as to each and every claim.

A Close Call on Evidentiary Issues: Hearsay and Prior Bad Acts
The closest issues in the case are evidentiary rulings. Keller (joined by Cooper and Stumbo) dissents and votes to reverse Garland's convictions and remand for a new trial. Keller's dissent finds "substantial prejudice" due to the erroneous admission of 1) "irrelevant" testimony regarding the victims' fears of Garland; 2) testimony from two witnesses as to uncharged prior bad acts (two previous occasions when Garland had discharged firearms in victim Jean Ferrier's direction) which the commonwealth introduced in violation of KRE 404(c) (requiring prior notice of intent to introduce prior bad acts), and a court order.

Victims' State of Mind Evidence Held Admissible
The dissent argues that the victims' state of mind was irrelevant, because Garland's alibi defense did not raise any issue of self-defense, accidental death, or suicide. The majority, led by Justice Lambert, states that the victim fear evidence was relevant because it invited speculation as to "why [the victims] would have such fear…." The dissent points out that the fact such evidence might lead to conjecture that Garland was a bad guy who should be feared "is *precisely* the reason that such evidence is *inadmissible." Citing* KRE 404(a).

According to the dissent, prejudice from the victim fear evidence, combined with prejudice from the erroneous admission of prior bad acts evidence deprived Garland of his right to a fair trial.

***Limine* Order Insufficient: Be Sure to Renew Objections at Trial**
Three months after the indictment, the defense asked for disclosure of all prior bad acts, and when none were produced, obtained a court order *in limine* prohibiting admission of any bad acts at trial because no KRE 404(c) notice was provided. The majority states that one may not rely on a broad ruling, but must also make a specific contemporaneous objection. The dissent complains that KRE 103(d) states that *a limine* order "is sufficient" to preserve error for appellate review.

According to the majority, Garland's prior shootings at Jean's trailer were properly admitted as evidence of his intent to kill Jean Ferrier. The dissent calls this a "nonsequitur." According to the dissent, the evidence should have been excluded due to the 404(c) violation, so it didn't matter whether it was otherwise admissible.

Extreme Emotional Disturbance: Justice Stumbo's Dissent
Garland's number one issue on appeal was the court's failure to give an extreme emotional disturbance (EED) instruction. Unfortunately, Justice Stumbo is the only Justice who agrees with Garland (in her separate dissent), that even though the defense failed to ask for an EED instruction, the trial court had an independent duty to instruct the jury on EED as part of the whole law of the case. Stumbo lists "ample evidence" suggesting that Garland killed the three victims while suffering from EED: One of the victims, Jean Ferrier, had just broken up with Garland, and [Garland believed] she was carrying another man's child. Garland had repeatedly fired a gun outside Jean's trailer in the days leading up to the killings. Also Garland did not start shooting until a partially clad man emerged from Jean's trailer bedroom.

EED Claim Fails to Meet "Continuity" Requirement
In order to deny Garland's EED claim and uphold his conviction for triple-homicide, the Kentucky Supreme Court seizes on the fact that Garland did not shoot at his ex-love continuously from the time of the break-up. Thus Garland's emotional condition did not qualify as an emotional disturbance that continued uninterrupted until the murders. *Cf. Springer v. Commonwealth*, Ky., 998 S.W.2d 439 (1999) (cited by Stumbo), and *Fields v. Commonwealth*, Ky., 44 S.W.3d 355 (2001) (woman who killed her newborn suffered EED continuously for 9 months of pregnancy).

The Court concedes that Garland had been "upset" since Jean had left him, and that a month prior to the murders he

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told his son Roscoe that he was going to kill Jean. The Court notes that the week before, Garland fired shots in the direction of Jean's trailer, and the afternoon before, fired shots into the ground near Jean's trailer. The majority discounts the emergence of a partially clad man as a potential additional triggering event, because the man was with the other victim, not Garland's girlfriend. Stumbo states in dissent that Garland was entitled to have the *jury* make the decision regarding EED.

Be Sure to Warn Defense Witnesses Not to Mention a Polygraph

Stumbo also dissents, alone, on the ground that two defense witnesses inadvertently mentioned that Garland had taken a polygraph examination. The jury could have inferred that since the results were not admitted, Garland must have failed the polygraph. The majority points out that defense witnesses were the ones who mentioned the polygraph, and holds that "the mere utterance of the word [polygraph] without a prejudicial inference as to the result is not grounds for reversal."

Some of Many Other Issues (All Justices in Agreement)

Okay to Excuse Juror Willing to Impose Death in a Horrible Case

It was okay to excuse a juror who initially stated she was opposed to the death penalty, but finally — when pressed whether she could impose death in a "really horrible" case—said "Yeah, I guess I could." This was not a "wholly unambivalent concession."

Failure to Consent to LWOP

Even though he was never given an opportunity to consent to a sentence of Life Without Parole (LWOP), Garland did not consent, and so it was all right not to instruct the jury on this mitigating penalty.

Character Evidence Must be as to "General Reputation"

The trial court did not err in refusing to allow Garland's ex-wife to testify that Roscoe as far as she knew never told the truth, and lied to her all the time. KRE 608 allows opinion evidence of character only as to "general reputation in the community," and not individual experience.

No Right to Public Defender Co-Counsel

The trial court did not err in denying Garland –who had hired private counsel—a co-counsel paid for by the state. Kentucky does not require a defendant to have two attorneys for capital cases.

No Mental State Alleged in the Indictment & No Aggravator

Even though it did not allege a culpable mental state, the indictment sufficiently informed the defendant of the specific offenses with which he was charged and did not mislead him. The indictment also failed to contain an aggravator. However, KRS 532.025(1) only requires written notice of aggravating circumstances prior to trial.

"Mysterious" X Indicating that Garland was Incompetent is a Typo

The trial judge marked an X indicating "Yes" that Garland, as a result of mental disease or defect, lacked the capacity to appreciate the nature and consequences of the proceedings against him or to participate rationally in his own defense. The Kentucky Supreme Court finds this "mysterious" X is – they "suspect"—a typo, and rules that it "shall be treated as a nullity."

Susan Jackson Balliet
Supervisor, Capital Post Conviction

Endnotes:

1. Anti-terrorism and Effective Death Penalty Act, 28 U.S.C.A. 2254(b) (1994)
2. *Brady v. Maryland*, 373 U.S. 83 (1963) (prosecutors required to turn over exculpatory evidence)
3. The *Kyles* materiality standard for *Brady* claims is met when "the favorable evidence could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict." 514 U.S., at 435. In other words, the petitioner must show a "reasonable probability of a different outcome." *Id.*, at 434.
4. Like Tennessee, Kentucky disallows claims in an RCr 11.42 action that have already been raised and determined, or which should have been raised and determined. *Sanborn v. Commonwealth*, Ky., 975 S.W.2d 905 (1998).
5. Kentucky also has a mandatory review process for capital cases conducted on direct appeal by the Kentucky Supreme Court. Under KRS 532.075(3): "With regard to the sentence, the court shall determine (a) Whether the sentence of death was imposed under the influence of passion, prejudice, or any other arbitrary factor, and (b) Whether the evidence supports the jury's or judge's finding of statutory aggravating circumstances…." ■

When you cease to dream, you cease to live.

-Malcolm S. Forbes

USING THE STATE COMPLAINT PROCESS FOR PROCEDURAL VIOLATIONS UNDER THE IDEA

Beth is a 12 year old on your caseload who is charged with terroristic threatening and disorderly conduct by the local school system. This is the third time the resource officer has filed charges against her for such conduct in the last year, and you know the judge won't be pleased to see her again. She is a special education student, having been determined to have an emotional behavioral disorder. She is also lower functioning with DMS IV diagnoses including ADHD and bipolar disorder. An ARC meeting was held after these charges were filed and it was determined that this behavior was not a manifestation of her handicapping condition. A review of the record, however, shows that Beth has not been receiving the services in the IEP appropriately, and that there are no specific behavior goals addressing the issues that continue to land her in court.

Mathew is an 8th grader at the local junior high school and has an IQ of 55. He is a special education student who has been charged with assault of a female student by stabbing her in the arm with a pencil. The prosecutor filed charges after the girl's mother complained she could get lead poisoning, and at the urging of the school. School officials are hoping that the court will consider placement of Matthew as he has been a constant disruption to the school. A review of his IEP shows that he has been moved from a self-contained classroom into a regular classroom for most of the day once he entered middle school the prior year. Most of the services he was receiving were discontinued, although he had a part time aid to assist him in the regular classroom. No behavior plan was in place and the record clearly shows a pattern of behavioral problems throughout his school career.

Defenders are routinely confronted with stories such as those of Matthew and Beth in their daily practice. While training and education in federal IDEA laws and regulations has been an increasing emphasis for those representing children in juvenile court, the constraints of heavy caseloads and limited resources makes the issue of IDEA remedies difficult. Defenders may be able to use due process hearings as a mechanism to gain relief for a child, or to find a private attorney do handle a civil claim for them. This article, however, explains the mechanism for filing an EDGAR complaint with the Kentucky Department of Education, a process-friendly infrequently used remedy that can gain your client considerable relief for the school's failures regarding appropriate educational services.

What the process does:

Under federal law, every state education agency must adopt written procedures for resolving complaints filed by an organization or individual regarding the failure of a local education agency to provide appropriate services under IDEA. The procedures must address how to remediate the denial of services, including if appropriate, the awarding of monetary reimbursement or other corrective action appropriate to the needs of the child, and the appropriate future provision of services for all children with disabilities. C.F.R. 300.660.

Kim Brooks

How to file a complaint:

Any organization or individual (including someone from outside the state) may file a signed written complaint alleging IDEA violations on behalf of a child, or a group of children. The complaint must include:

- A statement that the school or other public agency providing educational services to identified students has violated a requirement of KAR 606 Chapter 1 or IDEA regulations;
- The facts on which the statement is based: and
- Information indication that the violation did not occur more than one year prior to the date of the filing of the complaint, unless a longer period is reasonable because the violation is continuing or the complaintant is requesting compensatory services for a violation that occurred not more than 3 years prior to the date of the complaint.

The complaint should be mailed to the Kentucky Department of Education, Division of Exceptional Children, Capital Plaza Tower, 500 Mero Street, Eighth Floor, Frankfort, Kentucky 40602. KDE has a time limit of sixty (60) days in which to carry out an independent investigation, and issue a written decision addressing each allegation in the complaint through findings of fact and conclusions with reasons for the final decision.

Upon receipt of the written complaint, the Division of Exceptional Children sends a letter to the district's superintendent outlining the complaint timelines and response required by the district. Copies of the formal complaint and KDE letters are sent to the Regional Exceptional Children Consultant (RECC), the complainant, the local Director of Special Education (DOSE), and the child's parent(s).

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The district may resolve the complaint without formal investigation by KDE. If the district conducts its own investigation, KDE maintains the right to review the district's decision on the complaint. Within five (5) business days of receipt of the complaint notification, the district must notify KDE if it intends to conduct its own investigation. The investigation could include parent and/or district staff interviews, review of records, or other investigatory activities that will lead to resolution of the issues. The district should allow the complainant the opportunity to submit additional information, either orally or in writing, about the allegations. After the district has completed its investigation, a written decision, which addresses all the issues, is sent to the complainant and forwarded to KDE.

A lead consultant from KDE will be assigned and review all documentation. That person may either accept the district's resolution or determine if further investigation is needed. If the district determines it cannot investigate the complaint, KDE will conduct an immediate investigation. The complaintant may provide any additional documentation or information appropriate. In some cases, the lead consultant may also do an independent on-site visit, but at a minimum information will be collected via telephone interviews with the district personnel and the complaintant, or parent, as part of the process.

The consultant prepares a written report addressing each allegation in the complaint; findings of fact and conclusions; the reasons for the final decision(s); and if necessary, suggestions for technical assistance, negotiations or a corrective action plan (CAP). (See KDE Special Education Procedures Manual, November 2000) The report must address how to remediate the denial of those services, including, as appropriate, the awarding or monetary reimbursement or other corrective action appropriate to the need of the student; and appropriate future provision of services for al children with disabilities [34 CFR 300 660 (b) (1) (2)].

The final report is sent to the District's Superintendent, the Director of Special Education, the complainant, and the parents, as applicable. The complainant, parent, or the district can appeal the written decision from a complaint to the Commissioner of the Kentucky Department of Education. This appeal shall be filed within fifteen (15) business days of the receipt of the decision 707 KAR 1:340, Section 15. (4) It is the responsibility of the consultant to monitor the timeline for any corrective action plan put into effect.

Best issues for the complaint process:

While the complaint process is a relatively easy and efficient means of getting relief for students whose IDEA rights have been violated, it is best for issues that are clear procedural violations, and not disputes regarding the appropriateness of services. As such, consider using this process for issues such as:

- Failure to identify a student where there is a clear basis of knowledge
- Failure to implement special education services already agreed upon in an IEP
- Failure to adhere to timelines as established procedurally
- Changes in placement not made in accordance with IDEA notice provisions, or made in violation of IDEA for disciplinary purposes
- Failure to provide related services as agreed upon in an IEP (*i.e.* transportation, speech, counseling, etc.)
- Failure to adhere to a behavior plan through a pattern of juvenile court referrals and/or individuals whose behavior seeks to circumvent the IEP (*i.e.* resource officers)

Practice tips:

- Submit authorization on behalf of the parent to allow your representation of the child in order to receive a copy of the report of findings.
- Juvenile court procedures may be able to be dismissed or delayed pending the outcome of a KDE investigation into the alleged federal violation of your client's rights regarding education
- Juvenile court outcomes may be enhanced by a ruling from KDE that indicates the school has violated the client's rights in not providing appropriate services for their disability
- Complaints may be settled by the parties, including negotiation that can include withdrawal of the criminal complaint
- Always ask for compensatory education services, where creativity can abound. Think about special related services or outside activities to boost your client's self-esteem and capacity rather than merely additional academic work in addition to what they already do. Also consider asking for district or administrator training on problems that seem more systemic. Changes in policy can be ordered as well as part of a corrective action plan.
- Consider also asking for the use of an independent outside expert as appropriate to guide the process – one who has the particular expertise you need to fashion a remedial plan for the client, be involved in training staff, or otherwise in the implementation.

Consider also using this process on behalf of a group of students in appropriate cases (i.e. the failure of a detention center to have special education programs for children, a alternative classroom with polices that are "cookie cutter" and cannot individualize services for special education students, or a practice of excluding special education students from regular classrooms or extracurricular activities.) ■

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JUVENILE CASE REVIEW

Recent Cases in Juvenile Law (2000-Present)

Public/Status Offender Cases

Final and Published
(*i.e.*, cite to your heart's content)

M.M. v. Williams, Ky., 113 S.W.3d 82 (2003)
A juvenile who wishes to have their judgment stayed pending appeal must file for mandamus in the Court of Appeals. Habeas corpus not appropriate to review issue of whether the judgment is stayed by operation of law.

D.R.T. v. Commonwealth, Ky.App., 111 S.W.3d 392 (2003)
A person who is over 18 at the time of disposition may not be ordered into detention as a disposition.

X.B. v. Commonwealth, Ky.App., 105 S.W.3d 459 (2003)
Before a child can be committed and removed from the home, the juvenile court must make enter formal findings which demonstrate that commitment and removal from the home is the least restrictive alternative.

Commonwealth v. M.G., Ky.App., 75 S.W.3d 714 (2002)
A child has a right to personally confront the victim in a sex offense case, and a juvenile court may not violate that right by conducting an *ex parte* interview of the victim. Social workers are required to *Mirandize* a child before interviewing them, if the worker is acting as an agent of law enforcement. Juveniles have a right against self incrimination in the disposition of a juvenile case, so a child may not be punished for not admitting to his offense as part of a sex offense evaluation.

D.R. v. Commonwealth, Ky.App., 64 S.W.3d 292 (2001)
Generally a child cannot waive counsel unless they have first had occasion to speak with counsel. (Note: modified by amendment to KRS 610.060). *Boykin* applies in juvenile proceedings.

J.D.K. v. Commonwealth, Ky.App., 54 S.W.3d 174 (2001)
Juvenile sex offender not required to give blood sample to the Department of Corrections for inclusion in sex offender DNA database.

M.J. v. Commonwealth, Ky.App.,115 S.W.3d 830 (2003) (not final)
Trial court did not err by continuing trial for two weeks after Commonwealth announced closed, in order to allow the Commonwealth to meet the burden of proof. Continuations are in the sound discretion of the court, and the unavailability of the witness at the time trial commenced justified the trial court letting the Commonwealth re-open their case after announcing closed.

To Be Published, But Not Final
(*i.e.*, not yet to be cited, but maybe soon)

A.W. v. Commonwealth, Ky.App., ___ S.W.3d ___ (2003) (not final, MDR pending)
Child can be found in contempt of court for violating a condition of probation. Contempt proceedings must meet essentials of due process, so admission to contempt must meet *Boykin* requirements. Contempt sanction may be longer than the maximum detention time permitted for a public offender, as statute was not intended to limit court's contempt powers.

C.G. v. Commonwealth, Ky.App., ___ S.W.3d. ____ (2003) (not final, MDR pending)
Contempt proceedings may be initiated by petition and pick-up order. Admission to contempt must meet *Boykin* requirements. Child must personally admit guilt as part of the plea. Contempt sanction may be longer than the maximum detention time permitted for a public offender.

Not Final, Not To Be Published
(for information only, do not cite)

B.J.A. v. Commonwealth, Ky.App., 2003 WL 22519619(2003)(not final, MDR pending)
Child's age at adjudication, as opposed to age at the time of the offense, determines whether the child must be committed to the Department of Juvenile Justice as a juvenile sexual offender under KRS 635.510.

C.I. v. Commonwealth, Ky.App., 2003 WL 22361730 (2003)
Juvenile court not required to conduct a hearing on CR 60.02 motion arguing that the juvenile could not be a sexual offender because he is mentally retarded. While some evidence tended to support allegation of mental retardation, that evidence was insufficient to overcome presumption that original judgment was correct.

I.K. v. Foellger, Ky.App., 2003 WL 22271357 (2003)
District court may impose a no contact order as condition of release, even where that condition burden's the public school. However, district court may not continue that no contact order after commitment to the Department of Juvenile Justice. DJJ's authority with respect to treatment and placement may not be overruled by the district court.

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Youthful Offender Cases

(Note: Only Those With Significant Application To Juvenile Practice Are Included. Only Juvenile Issues Included In Summary, So Rulings On General Criminal Law Or Evidence Law Issues Are Not Included Unless They Have Special Application To Juvenile Court)

Final and Published

Phelps v. Commonwealth, Ky., 124 S.W.3d 237 (2004)
A juvenile court adjudication is not a "conviction" for the purposes of any offense under the penal code, so a youthful offender cannot be charged with being a "second or subsequent offender" or a "felon in possession of a firearm" on the basis of the offender's prior juvenile court record. Also, substantial defects in the degree of the offenses for which the child was indicted warrants dismissal of the indictment, and remand to juvenile court for a new transfer hearing.

Commonwealth v. Jeffries, Ky., 95 S.W.3d 60 (2002)
Juvenile entitled to a meaningful opportunity to be heard at his 18 year old hearing. This right was denied when the trial court denied Jeffries the right to present evidence in mitigation, and to controvert the contents of a report submitted by the Commonwealth.

Commonwealth v. Townsend, Ky., 87 S.W.3d 12 (2002)
Juvenile who agreed at his 18 year old hearing to be remanded to a DJJ institution for six months and then returned to court for a decision about whether to be probated or remanded to corrections, waived his right under the statute to be "finally discharged" upon the completion of the juvenile treatment program. (Note: KRS 640.030(2) amended subsequent to this to remove the "finally discharged" language).

Commonwealth v. Davis, Ky., 80 S.W.3d 757 (2002)
Juvenile who did not challenge whether he met the minimum criterion for transfer to circuit court and trial as an adult in either the circuit or district court waived his right to make that challenge on appeal.

Manns v. Commonwealth, Ky., 80 S.W.3d 430 (2002)
Juvenile court adjudication is not a "conviction" for the purpose of the rule of evidence permitting impeachment by prior "convictions." Statute permitting juvenile records to be used at sentencing or for impeachment is unconstitutional to the extent that it applied to the use of those records as impeachment. Juvenile court adjudications can be used at sentencing, provided they meet the minimum qualifications provided by statute.

Barth v. Commonwealth, Ky., 80 S.W.3d 390 (2001)
Co-defendant's statement, which was inadmissible at trial, was admissible at juvenile transfer hearing for the purpose of establishing probable cause. Rules of evidence do not apply in a transfer hearing.

Osborne v. Commonwealth, Ky., 43 S.W.3d 234 (2001)
Fact that burglary charge was omitted from transfer order transferring child to circuit court for trial as an adult on robbery and murder charges did not deprive circuit court of jurisdiction over burglary count. KRS 640.010 provides process for transferring the child, not the charge, and indictment can vary from transfer order so long as the child would still be eligible for transfer on indicted offenses.

Gourley v. Commonwealth, Ky.App., 37 S.W.3d 792 (2001)
Youthful Offender entitled to have PSI done by Department of Juvenile Justice, rather than Probation and Parole. Court order directing Probation and Parole to do PSI in YO case was prejudicial and reversible.

Stout v. Commonwealth, Ky.App., 44 S.W.3d 781 (2001)
Decision about whether to transfer juvenile under KRS 640.010 (the "eight factors test") must be supported by substantial evidence.

Not Yet Final, But Could Be Soon

Commonwealth v. J.T. ex. rel. Deweese, Ky.App.,
2003 WL 22417169 (2003)
Juvenile not entitled to discovery before automatic transfer hearing. KRS 610.342 not a rule of discovery, as legislature is not permitted to create a rule of practice and procedure. Discovery rules do not apply to preliminary hearings, such as transfer hearings.

Not Final, Not To Be Published

W.L. ex. rel. Deweese v. Commonwealth, Ky.App.,
2004 WL 406537 (2004)(not final, MDR anticipated)
Finding that a child used a deadly weapon for the purpose of the Robbery statute does not necessarily equal "use of a firearm" for the purpose of automatic transfer statute, KRS 635.020(4). ■

Tim Arnold
Juvenile Post-Dispositional Branch Manager

PRACTICE CORNER
LITIGATION TIPS & COMMENTS

Misty Dugger

Caution Required When Defendant Testifies at a Pretrial Suppression Hearing

When a defendant testifies at a suppression hearing prior to trial, his testimony cannot be later used against him at trial. However, certain precautions must be followed by trial counsel to protect the clients rights and assure proper procedures are followed.

(1) The defendant may testify at a suppression hearing and his testimony can not later be used against him at trial unless s/he fails to object. The landmark United States Supreme Court case is *Simmons v. U.S.*, 390 U.S. 377 (1968), where the Court specifically held that testimony given by defendant to meet standing requirements to raise objection that evidence is fruit of unlawful search and seizure should not be admissible against him at trial on question of guilt or innocence. *Shull v. Commonwealth,* Ky., 475 S.W.2d 469 (1971) applies *Simmons* to Kentucky. *Shull* held both that when defendant testifies in support of motion to suppress, his testimony may not thereafter be admitted against him at trial on issue of guilt unless he fails to object and that cross-examination of defendant who testified at motion to suppress should be limited to matters testified to on direct examination.

(2) Object to any questions on cross-examination by the Commonwealth that go beyond the scope of the direct examination. KRE 104(d) states that when the accused testifies on a preliminary matter, s/he does not become subject to cross examination on other issues in the case. Also *Shull v. Commonwealth,* Ky., 475 S.W.2d 469. (1971) holds that cross-examination of defendant who testified at motion to suppress should be limited to matters testified to on direct examination.

(3) Object, early and clearly on the record to any effort to use this testimony at trial. Before the client testifies, get a ruling on the record confirming that the testimony cannot be used pursuant to *Simmons* and *Shull*. During the trial remind all parties of this ruling and object if the Commonwealth attempts to introduce or reference testimony from the suppression hearing during the trial per the warning language in *Shull* that the right may be waived by failure to object.

Prior Possession of Marijuana Conviction Can Not Be Used to Enhance a Subsequent Trafficking in a Controlled Substance Charge

In *Woods v. Commonwealth,* Ky., 793 S.W.2d 809, (1990), the Supreme Court held that a drug trafficking conviction could not be enhanced by utilizing a prior conviction for possessing marijuana. The Court reasoned as follows:

The appellant was specifically indicted and tried under KRS 218A.990(1) for trafficking in Schedule II narcotics (cocaine) and under KRS 218A.990(4) for trafficking in marijuana. The portion of the language in these two sections crucial to the question of what type of previous offense constitutes a second or subsequent offender seems clear. KRS 218A.990(1) states in pertinent part:

> "Any person who knowingly and unlawfully traffics in or transfers a controlled substance classified in Schedules I or II which is a narcotic drug or which is included in KRS 218A.070(1)(d) shall, for the first offense, be [punishment stated], and for each subsequent offense shall be [enhanced punishment stated]."

The language of KRS 218A.990(4)(a) which is the basis of the appellant's conviction for trafficking in marijuana follows the same format as the language used in KRS 218A.990(1). The only differences are in the punishments meted out. In each instance the words "each subsequent offense" infers an offense of the same type as the underlying charge. At least this is so if we apply ordinary rules of grammar and sentence structure.

> There is ample reason to assume the General Assembly intended to refer to an offense of the same type. It makes sense to enhance convictions for possessing illegal drugs, offenses punished much less severely than trafficking, with more penalty if there has been previous convictions for trafficking. But the converse is not true. In trafficking the penalties are severe, and the subsequent penalties even more severe, so that enhancement where there is a prior offense would reasonably relate to a prior offense of the same kind, trafficking rather than a mere illegal possession. *Woods v. Commonwealth,* Ky., 793 S.W.2d 809, 814 (1990).

Be sure to object to this type of unlawful enhancement prior to trial and again during the trial if necessary to preserve the record on appeal.

Practice Corner needs your tips, too. If you have a practice tip to share, please send it to Misty Dugger, Assistant Public Advocate, Appeals Branch, 100 Fair Oaks Lane, Suite 302, Frankfort, Kentucky, 40601, or email it to Misty.Dugger@ky.gov. ■

The Public Value of Kentucky Public Defenders

Public defenders provide significant value to the people of Kentucky. Anthony Lewis, New York Times Pulitzer Prize winning columnist, has observed that "The lawyers who make Kentucky's indigent defense system work are in a great tradition. They prove what Justice Holmes said long ago: 'It is possible to live greatly in the law.'" The values that public defenders provide to the citizens of the Commonwealth add to Kentucky's wealth in uncommon ways.

1. Fair process that brings results we can rely on in criminal cases is the service defenders provide Kentuckians.

2. Defenders help over 100,000 poor Kentuckians with their legal problems when those citizens are accused of or convicted of a crime.

3. In the district and circuit courts in all 120 counties and in the Kentucky Supreme Court and Court of Appeals, defenders serve the Courts' need to fully understand both sides of the dispute before the decision is made.

4. Defenders serve the public's need for results in which they can have high confidence.

5. Defenders serve the citizens we represent by insuring their side of the dispute is fully heard and considered before their life or liberty is taken from them.

6. Defenders help children in juvenile court, addressing many of their family, educational, and social problems in order to help them become productive and law-abiding adults.

7. Defenders help the criminal justice system insure that fairness and reliability is not only what we say but what we do every day in the Courts of the Commonwealth.

NLADA American Council of Chief Defenders
Ten Tenets of Fair and Effective Problem Solving Courts

"Problem Solving Courts" are spreading across the country. Though the current wave of interest started with the creation of Miami's Drug Court in 1989, the nation's courts had a long prior history of seeking to solve the problems of offenders and communities through the imposition of sentences with rehabilitative conditions or indeterminate sentences with a chance for early release based on rehabilitation. The advent of mandatory minimums and determinate sentencing foreclosed many such options, leading to the establishment of Problem-Solving Courts as a new vehicle for effecting established rehabilitative objectives.

There currently are more than 500 drug courts operating, and more than 280 others currently in the planning process, in all 50 states. Although drug courts have existed the longest and been studied the most, Community Courts, Mental Health Courts, and other specialty courts are beginning to proliferate.

Despite Department of Justice and other publications that urge inclusion of defenders in the adjudication partnerships that form to establish Problem Solving Courts, the voice of the defense bar has been sporadic at best. Although defense representation is an important part of the operation of such courts, more often than not, defenders are excluded from the policymaking processes which accompany the design, implementation and on-going evaluation and monitoring of Problem Solving Courts. As a result, an important voice for fairness and a significant treatment resource are lost.

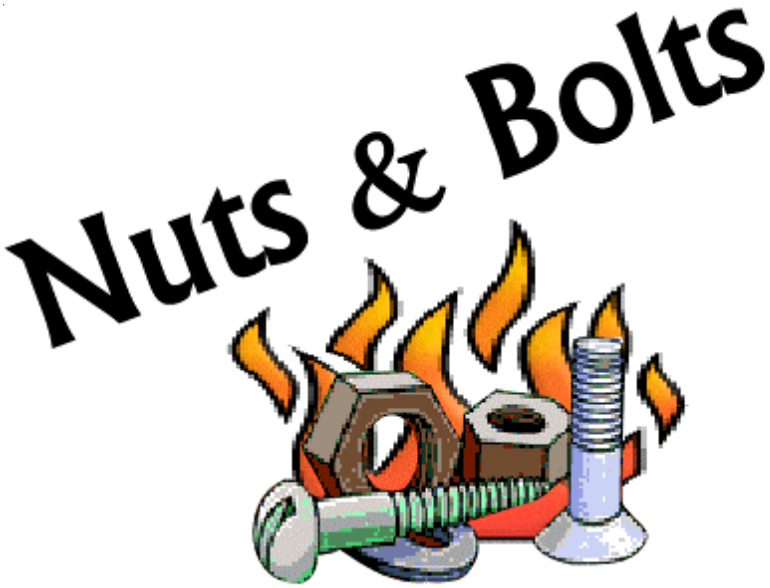
The following guidelines have been developed to increase both the fairness and the effectiveness of Problem Solving Courts, while addressing concerns regarding the defense role within them. They are based upon the research done in the drug court arena by pretrial services experts and others and the extensive collective expertise that defender chiefs have developed as a result of their experiences with the many different specialty courts across the country. There is not as yet, a single, widely accepted definition of Problem Solving Courts. For the purposes of these guidelines, Problem Solving Courts include courts which are aimed at reducing crime and increasing public safety by providing appropriate, individualized treatment and other resources aimed at addressing long-standing community issues (such as drug addiction, homelessness or mental illness) underlying criminal conduct.

The Ten Tenets

1. **Qualified representatives of the indigent defense bar shall have the opportunity to meaningfully participate in the design, implementation and operation of the court, including the determination of participant eligibility and selection of service providers**. Meaningful participation includes reliance on the principles of adjudication partnerships that operate pursuant to a consensus approach in the decision-making and planning processes. The composition of the group should be balanced so that all functions have the same number of representatives at the table. Meaningful participation includes input into any on-going monitoring or evaluation process that is established to review and evaluate court functioning.
2. **Qualified representatives of the indigent defense bar shall have the opportunity to meaningfully participate in developing policies and procedures for the problem-solving court that ensure confidentiality and address privacy concerns**, including (but not limited to) record-keeping, access to information and expungement.
3. **Problem solving courts should afford resource parity between the prosecution and the defense.** All criminal justice entities involved in the court must work to ensure that defenders have equal access to grant or other resources for training and staff.
4. **The accused individual's decision to enter a problem solving court must be voluntary.** Voluntary participation is consistent with an individual's pre-adjudication status as well as the rehabilitative objectives.
5. **The accused individual shall not be required to plead guilty in order to enter a problem solving court.** This is consistent with diversion standards adopted by the National Association of Pretrial Services Agencies. See Pretrial Diversion Standard 3.3 at 15 (1995). The standards stress, "requiring a defendant to enter a guilty plea prior to entering a diversion program does not have therapeutic value." Id.
6. **The accused individual shall have the right to review with counsel the program requirements and possible outcomes. Counsel shall have a reasonable amount of time to investigate cases before advising clients regarding their election to enter a problem solving court.**
7. **The accused individual shall be able to voluntarily withdraw from a problem solving court at any time without prejudice to his or her trial rights.** This is consistent with the standards adopted by the National Association of Pretrial Services Agencies. See Pretrial Diversion Standard 6.1 at 30 (1995).
8. **The court, prosecutor, legislature or other appropriate entity shall implement a policy that protects the accused's privilege against self-incrimination.**
9. **Treatment or other program requirements should be the least restrictive possible to achieve agreed-upon goals. Upon successful completion of the program, charges shall be dismissed with prejudice and the accused shall have his or her record expunged in compliance with state law or agreed upon policies.**
10. **Nothing in the problem solving court policies or procedures should compromise counsel's ethical responsibility to zealously advocate for his or her client, including the right to discovery, to challenge evidence or findings and the right to recommend alternative treatments or sanctions.** ■

32ND ANNUAL KY PUBLIC DEFENDER EDUCATION CONFERENCE

JUNE 22-23, 2004
HOLIDAY INN NORTH, LEXINGTON, KY



Hot Issues in Criminal Defense

For more information go to http://dpa.ky.gov/train/train.htm

Or Contact:

Patti Heying
OPA Training
100 Fair Oaks Lane, Suite 302
Frankfort, KY 40601
Tel: (502) 564-8006
Fax: (502) 564-7890
E-mail: Patti.Heying@ky.gov

8 Hours of Kentucky CLE Credit are being sought

KACDL MAY CLE PROGRAM AND BOARD MEETING

DATE: May 21, 2004

TIME: 12:30 p.m. EST

PLACE: 2nd Floor Meeting Room
Kenton County Justice Center
230 Madison Avenue
Covington, Kentucky

(It is right across the street from the Northern Kentucky Convention Center in downtown Covington)

Cost: $15.00 KACDL Members, $30.00 non-members

The Presenters:
Bob Lotz: Legislative update on the 2004 General Assembly
Dan Goyette and **Marcus Carey:** Subpoena Use and Abuse; Ethics and Practice, including the new KBA Opinion E-423

We are getting KACDL certificates and membership cards. All new members will get each to display. I look forward to seeing everyone there. These should be great classes and anyone that would like is invited to stay for the Board Meeting which will follow the classes.

Membership fee's are as follows:
Public Defenders: 1-5 year bar members $50.00 per year
5year + $100.00 per year
non-attorney $25.00 per year
(maybe we can encourage investigators, etc. to join)


KACDL President, Katie Wood

Anyone can send me a request with the following information to the address listed below.

Name:
Firm/ Organization:
Address:
State: Zip:
County:
Telephone: Office: Home: Fax:
Date of Birth
Bar Admission date: KBA No.
Education:
Practice Specialties, interests:

You can register for CLE classes by sending your information to the following:

KACDL
Charolotte Brooks, Executive Director
444 Enterprise Drive, Suite B
Somerset, Ky. 42501
Tel: (606) 677-1687; Fax: (606) 679-3007
E-mail: KACDL2000@yahoo.com

The ultimate measure of man is not where he stands in moments of comfort, but where he stands at times of challenge and controversy.

-- Martin Luther King

THE ADVOCATE

Office of Public Advocacy
100 Fair Oaks Lane, Suite 302
Frankfort, Kentucky 40601

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Upcoming OPA, NCDC, NLADA & KACDL Education

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June 22-24, 2004

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Kentucky Leadership Center
Faubush, KY
October 10-15, 2004

**** KBA ****
2004 Annual Convention
Radisson &
Lexington Convention Center
Lexington, KY
June 23-25, 2004

NOTE: DPA Education is open only to criminal defense advocates.

For more information:
http://dpa.ky.gov/train/train.htm

For more information regarding KACDL programs:

Charolotte Brooks, Executive Director
Tel: (606) 677-1687
KACDL2000@yahoo.com

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For more information regarding NLADA programs:

NLADA
1625 K Street, N.W., Suite 800
Washington, D.C. 20006
Tel: (202) 452-0620
Fax: (202) 872-1031
Web: http://www.nlada.org

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For more information regarding NCDC programs:

Rosie Flanagan
NCDC, c/o Mercer Law School
Macon, Georgia 31207
Tel: (912) 746-4151
Fax: (912) 743-0160

Thoughts to Contemplate

Challenges are what make life interesting; overcoming them is what makes life meaningful.

-Joshua J. Marine

Not all who wander are lost.

-J. R. R. Tolkien

It is better to correct your own faults than those of another.

- Democritus

Our greatest glory is not in never falling, but in rising every time we fall.

-Confucius